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## National Cooperative Research Act of 1984: Cartelism for High-Tech Ventures (and Others?)

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# National Cooperative Research Act of 1984: Cartelism for High-Tech Ventures (and Others?)

John A. Maher\* and  
Nancy J. LaMont\*\*

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## I. General

Unanimous passage of the *National Cooperative Research Act of 1984* (NCRA)<sup>1</sup> aimed at stimulating "innovative research and development by the private sector" to "enable American business and industry to keep pace with foreign competitors in a world increasingly dependent on technological innovation."<sup>2</sup> Thus, for the second time in two years,<sup>3</sup> Congress undertook the role of pan-industrial psychologist in response to nothing more than *perceptions* that the

1. Pub. L. No. 98-462, 98 Stat. 1815 (1984) (codified at 15 U.S.C. §§ 4301-4305 (Supp. II 1984)) [hereinafter NCRA].

2. Statement of J. Paul McGrath, Assistant Attorney General (Antitrust), 49 Fed. Reg. 50,121 at 50,122 (1984).

3. See Titles III & IV of The Export Trading Company Act of 1982. Pub.L. No. 97-290, 96 Stat. 1233 (1982) [hereinafter ETCA].

"antitrust laws" discouraged a form of commercial activity in a way prejudicial to successful American participation in international trade.<sup>4</sup> The 1984 legislation, accompanied by rhetoric that sounded at least akin to protectionism, aimed at encouraging interestingly *defined* joint research and development ventures. Whether or not the Act's objectives will be achieved is impossible to predict. However, it is all too easy to observe that benefits of NCRA neither are limited to American enterprise nor are ignored by foreigners. Non-American firms are prominent among those enterprises known to be taking advantage of NCRA.<sup>5</sup> With this, the writers are not necessarily unsympathetic but they note that the benefits of NCRA for foreigners are not keyed to reciprocity for American firms being afforded by their base nations.

#### A. Modification of "Antitrust Law"

It is more than possible to say that NCRA modified application of federal and various state "antitrust laws" in ways unheralded by popular reports contemporaneous with enactment and immediately subsequent commentaries.<sup>6</sup> What benefits are accorded those affili-

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4. ETCA responded to "perceptions" that potential for antitrust prosecutions prejudiced various export initiatives. H.R. REP. NO. 637(II), 97th Cong., 2d Sess. 9, *reprinted in* 1982 U.S. CONG. & ADMIN. NEWS 2444, 2446; H.R. REP. NO. 686, 97th Cong., 2d Sess. 2, 4, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 2487, 2489. *See generally*, D. UNKOVIC, J. MAHER & N. LAMONT, INTERNATIONAL OPPORTUNITIES AND THE EXPORT TRADING COMPANY ACT OF 1982, (BNA) (1984).

Passing NCRA, Congress desired to eliminate "any misconception" that the antitrust laws impeded formation of joint research and development ventures. H.R. CONF. REP. NO. 1044, 98th Cong., 2d Sess., 8-9 *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3133. Successive Assistant Attorneys General for Antitrust had testified concerning perceptions that antitrust impeded joint R&D efforts. Prof. W. F. Baxter is quoted in H.R. REP. NO. 656, 98th Cong., 2d Sess. at 11-12 and his successor, J. Paul McGrath, in S. REP. NO. 427, 98th Cong., 2d Sess. 3, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3107.

5. *See, e.g.* Mercedes Benz and Volvo affiliates are "members" of the Engine Manufacturers Association, 53 Fed. Reg. 12202 (1988); each of the Japanese firms known as Fujitsu Ltd., NEC Corporation and Sumitomo Electric Industries Ltd. seemingly has independently joint ventured with Bell Communications Research, Inc., 52 Fed. Reg. 4670 (1987), 53 Fed. Reg. 5059 (Feb. 2, 1988) and 53 Fed. Reg. 11352 (1988), which itself is a joint venture principally composed of the divested "Baby Bells", 50 Fed. Reg. 4280 (1985); North American Phillips, Bell Canada, Hydro Quebec and Ontario Hydro are part of a NAHB Research Foundation project, 53 Fed. Reg. 9154 (1988); numerous European and Japanese enterprises including NEC are involved in Computer Aided Manufacturing-International, 53 Fed. Reg. 4232 (1988); and, Nippon Telegraph & Telephone is involved in joint research with Corning Glass Works, 52 Fed. Reg. 28494 (1987). European and Japanese companies were among the earliest beneficiaries of an NCRA filing, 50 Fed. Reg. 3425 (1985).

6. *See, e.g.*, a report that NCRA's subjection of joint research and development ventures to "the rule of reason . . . seems declaratory of pre-existing law." Areeda, *Antitrust Analysis* ¶ 367 (1986 Supp. to 3d ed.). This ignores that NCRA's particularized rule of reason is applicable to consideration of joint ventures, and venturers' activities in furtherance thereof, in prosecutions under not only § 1 of the Sherman Act, 15 U.S.C. § 1 (1984), but also many laws (including the "unfair methods of competition" jurisdiction of the F.T.C.) comprehended by "antitrust laws" as defined at 15 U.S.C. § 4301 (1984) and "similar" state laws as implicated by 15 U.S.C. § 4302 (1984). By definition, rule of reason analyses are foreign to many of the affected federal and state statutes. *See infra* text accompanying notes 158-239.

ated in *defined* cooperation? Deferring to organization of the statute, the benefits differ in nature and quality. One inures to any association falling within the definition of "joint research and development venture"<sup>7</sup> whereas two others are contingent upon filing of minimal data disclosures with the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC).<sup>8</sup>

Assuming that an alliance falls within the definition, a "rule of reason" more charitable than Brandeis' classic formulation is appropriate to judicial consideration of its activities under not only section 1 of the Sherman Act - with which the feared *per se* characterization abbreviating rule of reason analysis usually is associated - but also antitrust statutes to which the classic is alien.<sup>9</sup> *This occurs without need for a filing with DOJ and FTC.* Accomplishing such a filing is a condition for achieving (a) limiting defined venturers' exposures in law suits to actual rather treble or punitive damages<sup>10</sup> and (b) putting plaintiffs at risk of being held to pay successful defendants' attorneys' fees.<sup>11</sup> Consequently, the numbers and identities of enterprises comprehended by NCRA filings with DOJ and FTC do not necessarily exhaust the catalogue of those entitled to benefit of the Act's own rule of reason.

### B. Congressional Irony?

Congress sometimes displays a genius for disinformative or ironic entitling of legislative acts.<sup>12</sup> Quite apart from NCRA's often curious substantive and procedural provisions, its name provides not

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For other perspectives, see MCINERNEY, *Antitrust Scrutiny of Joint Research and Development Venture in the U.S. and the EEC*, 1986 FORDHAM CORP. L. INST. 355 (B. Hawk ed. 1987); Miller, *Contractual Joint Ventures between Parties with Complementary Research Programs*, 68 PATENT & TRADEMARK J. 48 (1986); Holmes, *Research Joint Ventures and the Antitrust Laws - Recent Statutory and Administrative Changes*, 66 CHICAGO BAR RECORD 252 (1985); Wright, *The National Cooperative Research Act of 1984: A New Antitrust Regime for Joint Research and Development Ventures*, 1 HIGH TECHNOLOGY L.J. 133 (1986); Note, *Giving the Patent Owner His Due: Recent Developments in the Antitrust/Patent Misuse Interface*, 12 DEL. J. OF CORP. L. 135 (1987).

7. NCRA § 2(a)(6) & 3. 15 U.S.C. §§ 4301(a)(6), 4302 (1984).

8. See *infra* text accompanying notes 256-292.

9. See *infra* text accompanying notes 158-239.

10. 15 U.S.C. § 4303 (1983).

11. 15 U.S.C. § 4304 (1984).

12. Of ETCA's substantive provisions, only the addresses to commercial banking in the Act's Title II are concerned with international trading companies denominated as "export trading companies" (12 U.S.C. §§ 635a-4, 1843(c)(14), and 372(7) (1984)) whereas the addresses of ETCA Titles III & IV to antitrust (15 U.S.C. §§ 7, 45(a)(3), and 4011-21 (1984)) have no relevance peculiar to export trading companies as defined elsewhere in the Act. This tends to confuse the unwary. Thus, a 1985 casebook would have students believe that the benefits of Certificates of Review (CORs) under ETCA Title III (15 U.S.C. §§ 4011-21 (1982)) are limited to enterprises organized as export trading companies (ETCs). Ironically, consider the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1980), which constrained FTC in various particulars.

only an example of such disinformation but a clue that there is a dramatic difference between what the Act says and that which its proponents urged on an overt level. Looking only to NCRA's title, use of the word "national" is somewhat mysterious *ab initio*. "National" signifies neither that NCRA encourages only domestic "co-operative research" nor that benefitted cooperators need be American nor that benefits of such research will be peculiar to American enterprises nor that there will be value to the American economy as distinguished from a world economy. This is true despite the facts that NCRA's legislative history makes it clear that Congress' purpose,<sup>13</sup> in which the executive shared,<sup>14</sup> was to incentivize cooperative technological research among American firms and thereby to improve their competency to participate effectively in *international* competition. That it is possible to gear such statutory incentives to firms at least *formally* American was demonstrated only two years before NCRA when Congress adopted Title III of the Export Trading Company Act (ETCA)<sup>15</sup> in quite another promotional context but one also generated by mere *perceptions* that antitrust norms prejudiced exports.<sup>16</sup>

In 1984, Congress aimed to incentivize collaborative research and development (R&D) efforts by eliminating or, at least, minimizing American firms' alleged "misperception" that antitrust uncertainties militated against joint research and development ventures.<sup>17</sup> If the benefits of NCRA are not limited to American firms, what is the significance of "national"? To answer this, it is necessary to look to what Congress afforded in order to dispel inhibitions presumably induced by generalized misconceptions and to remark various anomalies implicit in the therapies.

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13. See H.R. REP. NO. 571(I), 98th Cong., 1st Sess., 8-13 (1983); H.R. REP. NO. 656, 98th Cong. 2d Sess., 7-10; S. REP. NO. 427, 98th Cong., 2d Sess., 1-4 *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3105-3108.

14. See Statement by the President proposing a "National Productivity & Innovation Act of 1983" (Sept. 12, 1983) and Presidential Message of Sept. 12, 1983 to Congress transmitting the text of what became H.R. REP. NO. 3878, *reprinted in* Trade Reg. Rep. (CCH) No. 14(II) (Sept. 19, 1983).

15. 15 U.S.C. § 4021(5) (1982). More subtle were ETCA Title IV's direct amendments of the Sherman Act and Federal Trade Commission Act (FTCA) to the ultimate effect that greatly enhanced jurisdictional thresholds operate to favor U.S. exporters to the degree their anticompetitive conduct avoids prejudicing domestic or export commerce. 15 U.S.C. §§ 6a & 45(a)(3) (1982).

16. H.R. REP. NO. 637(II), 97th Cong., 2d Sess. 9 *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 2444, 2446; H.R. REP. NO. 686, 97th Cong., 2d Sess. 2, 4 *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 2487, 2489.

17. Noting *inter alia* testimony of J. Paul McGrath, the Assistant Attorney General for Antitrust, that there was a "misperception" that antitrust laws constituted a barrier to joint R&D, the Senate Judiciary Committee opined that, "[t]o rectify this perception problem, this bill provides explicit congressional recognition of the fact that joint R&D activity will generally encourage competition, and that such competition should not be inhibited by unclear antitrust standards". S. REP. NO. 427, 98th Cong., 2d Sess. 3 *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3107.

*Principal* therapies deployed by NCRA are (i) insulation of the conduct of persons "making or performing a contract to carry out" collective research and development (R&D) activities<sup>18</sup> from characterization as offensive *per se* to not only federal and *state* "antitrust laws" (defined to include §5(a)(1) of the Federal Trade Commission Act (FTCA) *only* to the extent it proscribes "unfair methods of competition");<sup>19</sup> (ii) committing of prosecutions under all such "antitrust laws" to rule of reason analyses (even though various of the affected statutes prohibit conduct without necessary reference to anticompetitive purpose or effect) channeled to mandate assessing particularized effects on competition in R&D markets *inter alia*;<sup>20</sup> and, (iii) conditional limitation of certain R&D joint venturers' exposure to private suitors, under §§ 4 and 4C of the Clayton Act as well as particularized state laws, to actual damages (sometimes inaccurately referred to as "detrubling").<sup>21</sup> Since each principal NCRA therapy preemptively addresses state as well as federal laws, the Act enunciates national policy. Only these preemptions warrant use of "national" to describe the Act.

Similarly, the words "cooperative research" say both too much and too little. Much more than collaborative research is encouraged. Attention is focused on a liberal definition of R&D which embraces *collective* activities from research through "basic engineering", "experimental production", "testing", prosecution of patents, and licensing.<sup>22</sup> In various industries, this is quite an elaboration of R&D as hitherto used in the colloquial! Incidentally, quite apart from its role as a therapist, Congress also sought to induce some paranoia in private parties who might sue, under NCRA-defined "antitrust laws" or their state analogues, by reference to others' conduct of a defined "joint research and development venture". If plaintiffs lose, they may be held liable for successful defendants' costs *including* attorneys' fees.<sup>23</sup>

ETCA, which also modified federal and state "antitrust" norms<sup>24</sup> in the name of dealing with *perceptions* rather than reality,<sup>25</sup> limits benefits of its Certificates of Review (CORs) to enterprises at least formally American.<sup>26</sup> NCRA is remarkable not only for its failure to confine its benefits to Americans, the principal beneficiaries mentioned by sponsors, but also for going far beyond the

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18. 15 U.S.C. § 4301(a)(b) (1984).

19. 15 U.S.C. § 4301(a)(1) (1984).

20. 15 U.S.C. § 4302 (1984).

21. 15 U.S.C. § 4303 (1984).

22. *See supra* note 7.

23. 15 U.S.C. § 4304 (1984).

24. 15 U.S.C. § 4021(6) (1982).

25. *See supra* note 6.

26. 15 U.S.C. §4021(5) (1982).

purely technological theme urged by its original sponsorship.<sup>27</sup> Although the legislative history demonstrates considerable interest in physical sciences, the Act's encouragement is not so limited. We are taught that, when construing a statute, the starting place is the statute itself.<sup>28</sup> Therefore, it is appropriate to put aside NCRA's legislative history until it is needed to resolve ambiguity.

## II. Who And What Does NCRA Aim to Shield?

The starting point, before assessing benefits actually afforded R&D joint ventures by NCRA and considering techniques appropriate to maximum enjoyment of whatever benefit is afforded, is to consider *who* Congress benefitted or sought to benefit. To identify such beneficiaries, it is necessary to consider NCRA's rather lengthy description of an encouraged joint research and development venture and then to look to the therapies.

### *A. Beneficiaries Contemplated by NCRA's Inclusive-Exclusive Language and Therapies*

1. *Defining the Term "Joint Research and Development Venture".*—Within §2 of NCRA appears the following:

(a) For purposes of this Act:

. . . .

(6) The term "joint research and development venture means any group of activities, including attempting to make, making or performing a contract, by two or more persons for the purpose of —

(A) theoretical analysis, experimentation, or systematic study of phenomena or observable facts,

(B) the development or testing of basic engineering techniques,

(C) the extension of investigative findings or theory of a scientific or technical nature into practical

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27. See *supra* notes 13 and 14. While Congress' conception of R&D for purposes of NCRA may proceed well beyond the term's colloquial meaning, the therapies are not so broad as those contemporaneously adopted by the Commission of the European Communities. EEC Regulation 418/85 of Dec. 19, 1985 constitutes a block exemption from Art. 85(3) of the Treaty of Rome for certain types of joint R&D ventures. 28 O.J. EUR. COMM. (No. L 53) 5 (1985). Unlike NCRA, EEC Regulation 418/85 provides that various joint R&D ventures are valid if their activities do not include those on a list of proscriptions but permits parties to apply for explicit clearance if proposed restrictions are not explicitly approved or disapproved within the Regulation. Such clearances are promised no later than six months after application. The first issued on May 29, 1985, the Regulation having become effective on March 1st. See 49 Antitrust & Trade Reg. Rep. (BNA) No. 80 (July 11, 1985).

28. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197 (1976) (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) concerning § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1982)).



application for experimental and demonstration purposes, including the experimental production and testing of models, prototypes, equipment, materials and processes,

(D) the collection, exchange, and analysis of research information, or

(E) any combination of the purposes specified in subparagraphs (A), (B), (C), and, (D),

and may include the establishment and operation of facilities for the conducting of research, the conducting of such venture on a protected and proprietary basis, and the prosecuting of applications for patents on the granting of licenses for the results of such venture, but does not include any activities specified in subsection (b).

(b) the term "joint research and development venture" excludes the following activities involving two or more persons:

(1) exchanging information among competitors relating to cost, sales, profitability, prices, marketing, or distribution of any product, process or service that is not reasonably required to conduct the research and development that is the purpose of such venture,

(2) entering into any agreement or engaging in any other conduct restricting, requiring, or otherwise involving the production or marketing by any person who is a party to such venture product, process, or service, other than the production or marketing of proprietary information developed through such venture, such as patents and trade secrets, and

(3) entering into any agreement or engaging in any other conduct —

(A) to restrict or require the sale, licensing or sharing of inventions or developments not developed through such venture, or

(B) to restrict or require participation by such party in other research and development activities, that is not reasonably required to prevent misappropriation of proprietary information contributed by any person who is a party to such venture or of the results of such venture.<sup>29</sup>

Although the Act affords various definitions,<sup>30</sup> it does not define terms such as "phenomena," "observable facts," "basic engineering techniques," "scientific or technical nature," "models" and "processes" with which the "purposes" are peppered. On the face of the matter, it seems that analyses, experimentation and systematic

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29. 15 U.S.C. § 4301(a)(6)&(b) (1984).

30. 15 U.S.C. § 4301 (1984).

study embraced by the first *purpose* in NCRA §2(a)(6) are not limited to physical as opposed to, say, psychological phenomena. From this it follows that the focus is *not* limited to the hard sciences and their applications. Refinements of processes such as Pavlovian conditioning and other aspects of “human engineering” inevitably are included - at a minimum - within the overall concept. While it is obvious that all scientific approaches to observable facts are included, as are all other species of activities in which use of the word “engineering” is apropos, these are not all that limiting.

The fourth *purpose* of § 2(a)(6) is extraordinarily unlimited. Does not “research information” embrace market studies of not only consumer preferences but also other factors of minimal if any particular scientific significance albeit susceptible of scientific collection and measurement techniques? Where to stop? The sole limit is the prospect of courts’ applications of *ejusdem generis* to limit “research information” to things technologic and otherwise scientific *in esse* but where is the root? Is any one of the first three purposes limited to hard as opposed to soft sciences? Cannot economists model and psychologists engineer and marketers establish prototypes? In any event, at an essential definitional level, Congress’ focus is on persons’ *activities* when making “or performing” a contract for one or more *purposes* surviving the inclusive-exclusive phrasing of NCRA §§ 2(a)&(b).

2. *The Vehicle Performing the Joint Venture Contract—A Protected “Person”?*—Various facts of commercial life make it inevitable that, while the address of NCRA § 2(a)(6) is to “any group of activities . . . by two or more persons” oriented to making or performing a contract for definition and implementation of one or more recognized *purposes*, performance of such a contract may entail creation of yet another person or other legal entity<sup>31</sup> capable of unilateral day-to-day performance of the venture’s business. This includes conduct of not only analyses, experimentation, studies, reductions of inventions to practice, filing and prosecution of patent applications, testing, experimental production, licensing and other tasks explicitly and implicitly contemplated by the Act “on a protected and proprietary basis”<sup>32</sup> but also, presumably, functions such as centralized planning, budgeting, allocation and reallocation of available human and material resources, quality control and other aspects of informed enterprise management. Such functions are neither mentioned nor excluded by NCRA § 2(a)(6).

Assuming that such an entity is created by two or more per-

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31. For example, a business (Massachusetts) trust, corporation or limited partnership

32. 15 U.S.C. § 4301(a)(6) (1984).

sons<sup>33</sup> and that the entity is possessed of centralized management, are it and its activities entitled to whatever protections NCRA affords? Are its continued existence, and R&D activities within the scope of § 2(a)(6), also within the ambit of "any group of activities including . . . performing the" joint venture contract entitled to the NCRA "rule of reason"?<sup>34</sup> To respond negatively would be to say that NCRA is almost pointless.

Reference to NCRA § 3 discloses that Congress did *not* see fit to ordain that venturers must operate through the equivalent of a general partnership lest they forfeit two of the principal NCRA therapies afforded a defined "joint research and development venture." NCRA § 3 not only negates application of *per se* rules but ordains a "rule of reason standard" for appraisal of "the conduct of *any person* . . . making or *performing* a contract to carry out a" joint R&D venture.<sup>35</sup> Thus, assuming proper draftsmanship of both the base contract contemplating an organized vehicle largely embodying the venture and the vehicle's articles of incorporation (or limited partnership agreement or instrument of trust), the vehicle literally performing the contract is a protected "person" for purposes of NCRA § 3.

Nothing in NCRA § 2(a)(6) precludes formation of such a vehicle to conduct business of the venture. Rather, in order to permit operation "on a protected and proprietary basis" including unitary licensing, such a measure seems encouraged on an implicit level. Surely, prosecuting patent applications and licensing technology on behalf of a joint venture would be inconvenient without embodying the venture in a vehicle capable of performing legal acts. Even if the encouragement is not deemed obvious, it seems that formation of a jointly-owned R&D vehicle and its subsequent functioning are themselves "activities" of the contracting parties within the scope of § 2(a)(6). At a later point,<sup>36</sup> it is suggested that prudent counseling will see to having a vehicle embodying venture cost and profit centers become party to the base contract and thereby become one of those "making" as well as "performing" the contract.

What of the therapy implicit in conditional limitation of private plaintiffs to single damages? Effect on an R&D vehicle is less certain since the statutory approach to limitation of damages is less explicit than is NCRA § 3. Effective counseling is indispensable to achieving maximum availability of the NCRA § 4 shields for joint ventures as well as their sponsors. The shields afforded by NCRA §

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33. *Id.*

34. 15 U.S.C. § 4302 (1984).

35. *Id.*

36. *See infra* text accompanying note 39.

4 do not specify the persons to whom the shields are available. Rather, § 4 looks to compensable injuries caused by offensive *conduct* that is within “the scope of a notification” filed with FTC and DOJ.<sup>37</sup> According to NCRA § 6(a), such notifications can be filed by “[a]ny party to a joint research and development venture, acting on such *venture’s* behalf.”<sup>38</sup> It is possible to argue, and plaintiffs surely will, that “joint research and development venture” is a term of art embracing *only* the activities of persons contracting to bring the ventures into existence; that detrebling provisions should be construed strictly; and, that Congress intended only to encourage collaboration by principals rather than excesses by their creatures. The first line of response is that NCRA § 2(a)(6)’s definition of venture focuses on *activities* pursuant to contract contemplating one or more explicitly permitted *purposes* and that the NCRA §4 shields run to *conduct*. Nonetheless, all of this commends that counsel to venturers, *if* use of a formalized joint venture vehicle is important to the R&D effort, not only clause the “notification” to detail organization and operation of the vehicle (as part of the venture’s “nature” evoked by NCRA<sup>39</sup>) but also cause the vehicle to become a party to the basic contract. It would seem that an R&D vehicle embodied in a limited partnership or a business trust almost inevitably must become party to the base contract. This is not true of the incorporated vehicle. An obvious purpose for causing it to be a party is to ensure availability of the NCRA § 4 insulation.

Boot-strapping? Putting aside significance of having the vehicle become party to the base contract, those defending a joint venture vehicle will argue that use of the phrase “acting on such venture’s behalf” in NCRA § 6(a) is simple English indicative of a remedial purpose to shield all disclosed aspects of the venture including its formal manifestation. Such an appeal may run afoul of strict construction. However, if a suitably formalized vehicle is *literally* a party to a contract being performed within the scope of NCRA § 2(a)(6), the plain language of NCRA § 6(a) is such as to make it most difficult for a court to conclude that the vehicle is unentitled to invoke NCRA § 4.

### *B. Conduct Within NCRA’s Safe Harbors*

What does NCRA shield? Conduct in realms beyond the “hard sciences” is a given.<sup>40</sup> What of physical, chemical, biological, mathematical, cybernetic and other areas of functional development be-

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37. 15 U.S.C. § 4305(a)&(b) (1984).

38. 15 U.S.C. § 4305(a) (1984) (emphasis supplied).

39. 15 U.S.C. § 4305(a) (1984).

40. See *supra* text accompanying note 34.

yond research in the hard sciences?

According to NCRA § 2(a)(6), proper purposes of a defined venture extend beyond research to practical development including "experimental production and testing of models, prototypes, equipment, materials, and processes."<sup>41</sup> Clearly, this scope is not limited to bench-scale production and testing. Neither is the NCRA development cycle limited by considerations of siting experimental production, performance of experimental production, disposition of its product, duration of testing, or purpose of testing. There are no limits upon either the sources of equipment, materials, models, processes and prototypes to be tested or the identities of testers. This absence of limitations raises interesting questions as to when experimental production and testing can be deemed to lose their experimental characters. Presumably, if the process to be licensed or materials to be yielded by proprietary processes involve such dangers to employees or third parties that standards of performance (including quality control techniques) must be developed before licensing can commence, long production runs can be not only justified but demanded before testing of a process or its product can be regarded as complete.<sup>42</sup> While it may be relatively simple for a third party to infer that an ultimate product is in full non-experimental production and distribution, such a perception is not infallible. Further, validity of such a perception is even less likely in context of intermediate materials and customized applications than it is with consumer products.

Some sorts of R&D produce nothing but prototypes (e.g. customized multi-tasked computers and chemical reactors) which are quite susceptible of installation at a customer's site for simultaneous experimentation and commercial use until there is a quantum leap to the next generation of pertinent technology. Commercial worth of various processes can be gauged only by permitting the marketplace to test yielded material (e.g., superficially identical organic chemicals or man-made fibers produced by different processes frequently prove to be anything but fungible and to have differing commercially significant handling characteristics when in the process machinery of customers for such intermediates). Intrinsic handling differences among seemingly generic products can occur on not only company-by-company but also, within an enterprise, plant-by-plant bases.

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41. 15 U.S.C. § 4301(a)(6)(C) (1984).

42. Consider, quite beyond ordinary products liability and workplace safety ramifications, the time and investment implicit in processing applications for marketing clearances pertinent to color additives, food additives, medical devices, new drugs, radioactive devices and toxic chemicals under the Food, Drug & Cosmetic Act, 21 U.S.C. § 321 (1982), the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (1982), and the Radiation Control for Health & Safety Act, 42 U.S.C. §§ 263b-263n (1982). *See generally*, FOOD & DRUG LAW INSTITUTE, SEVENTY-FIFTH ANNIVERSARY COMMEMORATIVE VOLUME OF FOOD AND DRUG LAW (1984).

Consumer-oriented software companies openly market "beta-ware", inviting customers (at a deep discount from the targeted price of an ultimate product) to report "bugs" as part of the development process. In the ultimate, there is no consistently bright line to delineate the end of testing contemplated by NCRA. Resolution of the issue will present fact questions on industry-by-industry, process-by-process, product-by-product, and service-by-service bases.

An inevitable question will involve demarcation of testing appropriate to R&D as distinct from ordinary customer service. For example, awareness of either intra-product differences or differences among customers' processing set-ups, or both, cause various marketing organizations to maintain "applications and development" staffs to give customers aid in coping with peculiarities of the marketers' products. NCRA-defined joint ventures, which NCRA § 2(a)(6) invites to become licensors, that undertake test production are not likely to refuse such applications and development cooperation to important licensees. When venturers so opt to cooperate, they will do well to plan to be in a position to prove that customer service is part of the testing essential to development as well as marketing of licensed technology *presumably* contemplated by NCRA § 2(a)(6). This, of course, assumes that the NCRA safe harbors are worth the effort.

### III. The NCRA Rule of Reason

Are availabilities of the NCRA rule of reason and limitation of damages matters of concern in the real world? The *per se* label is an antitrust term of art usually having meaning *only* in context of judicial applications of § 1 of the Sherman Act and its state analogues. Mere organization or existence of a joint venture for purposes other than those which are fairly clearly anticompetitive *never* has been characterized as offensive *per se* to the Sherman Act or any other federal antitrust norm.<sup>43</sup> Thus, a quick appraisal of NCRA's rule of reason might seem to suggest that its principal contribution is redundancy and that whatever benefits NCRA offers lie in the so-called "detrebling" therapy and inducing potential private plaintiffs into paranoia concerning assessment of full costs for unsuccessful prosecutions. If this were true, it would be appropriate to ignore the NCRA rule of reason and proceed immediately to develop how limitation of liability is attained and maintained.

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43. In the course of deliberations leading to enactment of NCRA, this conclusion was phrased in different fashions. One of the most valuable is the observation that, "if properly structured, most joint ventures are compatible with the antitrust laws provided they do not include other ancillary restraints historically considered unlawful". H.R. REP. NO. 656, 98th Cong., 2d Sess. 12 (1984).

### A. "Rule of Reason Standard"

Implicit in the leap to limited liability would be acceptance of a thesis that NCRA's "rule of reason standard" is little beyond a reaffirmation of the obvious. However, it is necessary to test this thesis. NCRA § 3 is remarked before enlargement on attainment and maintenance of limitation of liability is pursued.

#### Rule of Reason Standard

Sec. 3. In any action under the antitrust laws, or under any State law similar to the antitrust laws, the conduct of any person in making or performing a contract to carry out a joint research and development venture shall not be deemed illegal *per se*; *such conduct shall be judged on the basis of its reasonableness*, taking into account all relevant factors affecting competition, including, but not limited to, effects on competition in properly defined, relevant research and development markets.<sup>44</sup> (emphasis supplied)

This is curious language. NCRA § 3 not only clearly imposes its "rule of reason standard" on much more than organization and operation of NCRA-defined ventures but also mandates "relevant factors" for analyses. Further, § 3 anomalously implicates statutes to which *per se* formulae are quite foreign. Thus, clarity is attempted to be served herein by referring to the "NCRA rule of reason" as distinct from that normally associated with § 1 of the Sherman Act.

Only under § 1 of the Sherman Act and various state statutes identical or substantially similar to it<sup>45</sup> have courts characterized certain species of conduct as offensive *per se*. Yet, "antitrust laws" is a term liberally defined by NCRA § 2(a)(1)<sup>46</sup> to embrace<sup>47</sup> not only the Sherman Act, import-oriented antitrust provisions of the Wilson Tariff Act (which are similar to the Sherman Act), and the Clayton Act but also FTCA § 5<sup>48</sup> "to the extent [it] applies to unfair methods of competition." There is no distinction among legal, equitable and criminal applications of the Sherman, Wilson and Clayton Acts. There is no distinction between administrative remedies available to FTC staff and matters originally cognizable by courts.

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44. 15 U.S.C. § 4302 (1984).

45. *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (§ 1 of Sherman Act, 15 U.S.C. § 1 (1982)); N.Y. Gen'l Business Law § 340 *et seq.* (Supp. 1988); ANN. CAL. BUS. & PROF. CODE § 16700 *et seq.* (Supp. 1988).

46. 15 U.S.C. § 4301(a)(1) (1984).

47. By incorporating "subsection (a) of the first section of the Clayton Act", NCRA § 2(a)(1) includes the Sherman Act, 15 U.S.C. §§ 1-7 (1982); §§ 73-77 of the Wilson Tariff Act, 15 U.S.C. §§ 8-11 (1982); and, the Clayton Act, 15 U.S.C. §§ 12-26 (1982).

48. 15 U.S.C. § 45(a)(1) (1982).

The overall effect of the definition is remarkable. For example, most substantive provisions of the Clayton Act condemn particularized species of conduct without necessary reference to actors' purposes<sup>49</sup> and some of the Act's proscriptions dispense with need to prove anticompetitive effects.<sup>50</sup> Yet, excepting only §§ 7 and 8 of the Clayton Act,<sup>51</sup> no substantive provisions of the Clayton Act have peculiar relevance to joint ventures generally let alone those defined by NCRA § 2(a)(6). It goes without saying that FTC jurisprudence is not marked with great respect for the rule of reason.<sup>52</sup> Nonetheless, if NCRA § 3 is applicable to challenged conduct, prosecutors of all Sherman and Clayton Act theories as well as FTCA "unfair methods of competition" and all Clayton Act theories involving "the conduct of any person in . . . performing a contract to carry out a joint research and development venture" will be burdened to make out a rule of reason case including competitive effects in relevant R&D markets.

The authors point out that the buckshot approach of NCRA § 3 differs dramatically from rifle-shot amendments of the Sherman and FTC Acts effected by ETCA Title IV,<sup>53</sup> as well as the administratively-controlled availability of a Certificate of Review (COR) under ETCA Title III.<sup>54</sup> Doing so, the authors do not decry the approach of NCRA § 3. They merely point out that it plays roles far greater than stating the obvious or avoiding judicial evolution of *per se* formulae condemning competitors' joint R&D efforts. NCRA § 3 therapy inescapably includes effective albeit indirect amendment of various "antitrust laws" in so far as they otherwise apply to formation and conduct of joint R&D ventures oriented to *purposes* blessed by NCRA § 2(a)(6).

Assuming a jurisdictional nexus, the point of classic *per se* condemnations under § 1 of the Sherman Act is to relieve trial courts

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49. NCRA §§ 2(a), 2(c)-(e), 3, 7, 8. 15 U.S.C. §§ 13(a), 13(c)-(e) 14, 18, 19 (1982). Note that § 2(f) of the Clayton Act focuses on defendant's knowing receipt of an otherwise prohibited price discrimination. 15 U.S.C. § 13(f).

50. NCRA § 2(c)-(e). 15 U.S.C. §§ 13(c)-(e) (1982).

51. 15 U.S.C. §§ 18, 19 (1982). It should be noted that a non-substantive part of the Clayton Act, which has pertinence to joint ventures of substantial size, is also arguably, albeit nonsensically affected by the NCRA rule of reason. § 7A of the Clayton Act, looking to timely prior notice of various combinations, entails *inter alia* civil penalties for non-compliance. 15 U.S.C. § 18A(g)(1) (1982).

52. See, e.g., *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321-22 (1966).

53. 15 U.S.C. §§ 6a & 45(a)(3) (1982).

54. 15 U.S.C. §§ 4012-21 (1982). There are other rifle-shot exonerations from antitrust proscriptions. See, e.g., the Webb-Pomerene Act, 15 U.S.C. §§ 61-66 (1982); Defense Production Act, 50 U.S.C. app. §§ 2158 & 2158a (1982); Small Business Act, 15 U.S.C. § 638(d) (1982). Note that the Webb-Pomerene exemptions are particularized whereas those under the Defense Production and Small Business Acts are far broader. Further, each of the latter preempts FTCA § 5(a)(1) without discrimination between "unfair methods of competition" and "unfair or deceptive acts or practices".



from weighing allegedly benign purposes of the actors or the relative inconsequence of their conduct in connection with price stabilization and other forms of direct market rigging with which the courts have had considerable experience.<sup>55</sup> Obviously, the "performing" language of NCRA § 3 provokes a question as to whether it undoes any *per se* doctrines to the degree they impact, say, licensing of venture-developed technology. This is but one of many questions raised by NCRA § 3.

### B. *Sherman Act Implications*

The point of this article is neither to dwell on the chicken or egg problem concerning which of the "rule of reason" or "per se doctrine" is the essential expression of § 1 of the Sherman Act, nor to complain about judicial inclusion of conduct less reprehensible than competitors' joint market-rigging within the catalogue of *per se* offenses.<sup>56</sup> Rather, since Congress saw fit to subject statutes other than § 1 of the Sherman Act to the NCRA rule of reason and to evoke "relevant factors" which must be considered by NCRA rule of reason adjudicators, it is appropriate to consider various applications of both § 1 of the Sherman Act and other comprehended federal statutes in order to suggest the degree to which Congress indulged something beyond merely reassuring therapy. Ventures defined by NCRA § 2(a)(6) provide the context for applications considered in this article. Neither time nor space permits exhaustive expositions of affected federal statutes. No "State law similar to the antitrust laws"<sup>57</sup> is developed in detail but, after remarking upon the impact of NCRA on the Federal Trade Commission Act,<sup>58</sup> the authors draw the reader's attention to the distinct possibility that Congress failed to burden prosecutions under certain of the states' "little FTC acts"<sup>59</sup> with the NCRA rule of reason.

1. *Section 1 of the Sherman Act.*—Focusing on § 1 of the Sherman Act, it goes without saying that the prosecutorial theory *always* postulates a joint venture *of some sort*. Section 1 addresses restraints on trade effected by "contract, combination . . . or conspiracy."<sup>60</sup> If unassisted by precedent confirming clear availability of a *per se* characterization of the conduct in question,<sup>61</sup> the rule of

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55. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

56. See, e.g., Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) (resale price maintenance); Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958) (tying); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984) (tying).

57. 15 U.S.C. § 4302 (1984).

58. 15 U.S.C. § 4301 (1984).

59. See *infra* text accompanying notes 247-252.

60. 15 U.S.C. § 1 (1982).

61. See *supra* note 55.

reason prosecutor has the heavy burden of establishing the anticompetitive purpose of those alleged to have agreed on a course of conduct *or* the substantially adverse effect on competition of the alleged collaborators' conduct.<sup>62</sup> Additionally, if the prosecutor is a private person proceeding under §§ 4 or 16 of the Clayton Act, she must establish the personal injury experienced or to be experienced<sup>63</sup> by plaintiff. If there is an admitted affiliation for a purpose (such as a joint venture contract) between or among parties alleged to be effecting an unreasonable restraint of trade, the "contract, combination . . . or conspiracy" element of proof is satisfied for which reason plaintiff's principal attention will be to proving an actual restraint as well as its anticompetitive purposes and/or effects.

Although a more recent decision of the Supreme Court may have changed the ultimate burden on triers of fact to a degree,<sup>64</sup> Justice Brandeis' opinion in *Chicago Board of Trade v. U.S.* continues to be the leading elucidation of the rule of reason.

The true test of legality is whether the restraint imposed is such as merely regulates and *perhaps thereby promotes competition* or whether it is such as *may* suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business, . . . its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual and *probable*. The history of the restraint, . . . the purpose or end sought to be attained, are all relevant . . . . This is not because good intention will save an achieved objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and *to predict consequences*.<sup>65</sup>

The *Chicago Board* arrangement entailed limited price freezes measured in hours or weekends as incidental tools of a larger self-regulation scheme among persons otherwise competitors. The purpose was to serve commodities traders' access to knowledge of market prices and availability of pertinent commodities.

The much later *Professional Engineers* decision (perhaps unconsciously) refined the purpose of rule of reason analysis to determination of whether the restraint in question has the *net effect* of promoting or suppressing the competitive process.<sup>66</sup> Prior to the holding, it was common to rely on *Chicago Board* for the short-hand proposition that the rule of reason condemns only arrangements that

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62. *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238-39 (1918); *National Soc'y. of Prof. Eng'rs. v. United States*, 435 U.S. 679, 686-96 (1978).

63. 15 U.S.C. §§ 15 & 26 (1982).

64. *National Soc'y. of Prof. Eng'rs. v. United States*, 435 U.S. 679, 686-96 (1978).

65. 246 U.S. 231, 238-39 (1918).

66. *See supra* note 64.

are "on balance" anticompetitive. It is quite possible to argue that *Professional Engineers* does not prejudice the essentially neutral restraint that improbably promotes or suppresses the process of competition. In any event, decisions after *Chicago Board* and before *Professional Engineers* tended to adhere to the view that a rule of reason analysis condemns an agreement which has the purpose or *likely* effect of significantly reducing competition. There was no broad adherence to a philosophy tolerating restraints prejudicing competition because they were complemented by aspirations to achieve some higher good. *Professional Engineers'* concern with a net effect did not alter this theme. Indeed, language in the recent *NCAA v. U. of Oklahoma* decision marks a disposition to honor Brandeis' approach. The Supreme Court refused *inter alia* argument that the price-fixing and market allocation implicit in the NCAA football television plan should be treated as offensive *per se*. Doing so, the Court honored an argument that the very nature of the industry was such that horizontal restraints were necessary to marketing its product.<sup>67</sup>

In any event, assuming absence of an anticompetitive purpose, note that Brandeis guided us to look beyond immediate effects to the *probability* that a restraint would come to injure competition. This served a philosophy best epitomized (in a later *per se* case) to the effect that the Sherman Act is predicated upon a conviction that "unrestrained interaction of competitive forms will yield the best allocation of . . . resources, the lowest prices, the highest quality and the greatest material progress."<sup>68</sup> Does NCRA § 3 modify the rule of reason enunciated by Brandeis?

There are suggestions that NCRA §3 narrows the litigatory focus to *actual* effects on competition. The authors disagree. They submit that invocation of "all relevant factors affecting competition" by NCRA § 3 does not narrow the *Chicago Board* rule of reason. Factors "affecting competition" include not only venturers' purposes but also "actual and probable" effects<sup>69</sup> of the R&D venture. While it is inescapable that NCRA §3 also orients courts to actual "*effects . . . in . . . relevant research and development markets,*" it is equally inescapable that Congress took care to indicate that the total analysis is "not limited" to effects<sup>70</sup> in R&D markets.

If resort to legislative history is necessary (which does not, at this juncture, seem to be the case), there is no doubt that Congress' particularity in § 3 is intended to guide courts "in focusing on the

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67. 104 S. Ct. 2948 (1984).

68. Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958).

69. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238-39 (1918).

70. 15 U.S.C. § 4302 (1984).

major *potential* anticompetitive and procompetitive effects of joint R&D ventures".<sup>71</sup> Moreover, there is no explicit suggestion that significant anticompetitive effects can be compensated for by good intentions concerning or good effects in contexts other than competitive. Yet, those disquieted by potential for twisting the rule of reason to burden courts with identifying desirable societal goals (other than promotion of competition), and weighing such goals against injuries to the competitive process,<sup>72</sup> will not be happy with the legislative history's allusions to economies of scale.<sup>73</sup> Unhappiness should be leavened by recognition that, on an explicit level, NCRA § 3 neither commends nor otherwise purports to authorize courts to balance other values against protection of the competitive process.

2. *Import of NCRA § 2(b) Exclusions and Qualifications.*—What of conduct hitherto deemed offensive *per se* to § 1 of the Sherman Act? No *explicit* inroads are made on *per se* doctrines but nonetheless there are inroads! Focusing only on NCRA §§ 2 and 3, consider price-restricted licenses among defined venturers otherwise subject to the *per se* rule of *Line Material*.<sup>74</sup> The manner in which NCRA § 2(b) qualifies exclusions<sup>75</sup> from the definition of "joint research and development venture" is provocative both in isolation and, more appropriately, in context of § 2(a)(6). NCRA § 2(b) is superficially concerned with limiting "activities" of defined ventures. However, it has other implications which demand present consideration. Discussion of structural implications (i.e., whether indulgence in any activity excluded by § 2(b) bars an otherwise qualifying venture from the NCRA §§ 3, 4 and 5 safe harbors) is deferred to later commentary concerning organizing and maintaining R&D ventures.<sup>76</sup>

At this point, it is important to note that each of the three NCRA § 2(b) exclusions is qualified and that each exclusion deals with activities that can be the approximate occasion of antitrust violations. Potencies for the three explicit qualifications to accommodate defined ventures' evasion of otherwise strong Sherman Act policies, or otherwise to burden prosecutions under § 1 of the Sherman

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71. *Joint Explanatory Statement of the Committee of the Conference*, H.R. Rep. No. 98-1044, 98th Cong. 2d Sess. 9. Earlier, the conferees observed that the NCRA rule of reason requires that "courts must realistically analyze the competitive effects of any challenged joint R&D venture." *Id.*

72. See, e.g., L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST*, 186-89 (1977) [hereinafter L. SULLIVAN].

73. *Supra* note 71. See also S. REP. NO. 427, 98th Cong., 2d Sess. 19, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3116.

74. *United States v. Line Material Co.*, 333 U.S. 287 (1948).

75. 15 U.S.C. § 4301(b) (1984). For the text of NCRA § 2(a)(6) and 2(b), see *supra* text accompanying note 29.

76. See *infra* text accompanying notes 323-328.

Act, are considered at this point.

(a) *Data exchange among competitors.*—The first *qualified* exclusion, set forth at NCRA §2(b)(1),<sup>77</sup> addresses *competitors'* exchanges of costs, prices and other sensitive data. The exclusion relates to *U.S. v. Container Corporation*<sup>78</sup> and various DOJ policy statements.<sup>79</sup> The second, *qualifiedly* excluding conduct "restricting, requiring, or otherwise involving the production or marketing by . . . a party to [the] venture of any product, process or service",<sup>80</sup> provokes attention to allocative and tying *per se* doctrines under § 1 of the Sherman Act as well as, ultimately, § 3 of the Clayton Act.<sup>81</sup> The third, *qualifiedly* excluding restraints imposed in connection with transfers of "inventions or developments" generated *outside* of the agreed venture as well as restraints on *other* R&D efforts of parties to the venture,<sup>82</sup> has more than an occult relationship to various *per se* applications concerning not only tying in intellectual property areas but also technology transfers generally.

Although each of the NCRA § 2(b) exclusions has its own qualification, and each qualification has its own phrasing, there are common themes. The broadly-described excluded activities are not *necessarily* characterized by NCRA or another statutory scheme as illegal for indulgence by either ordinary enterprises or formally arranged joint ventures. Yet, the breadth of the exclusions is such that particular manifestations of comprehended conduct may place actors in *at least* the occasion of violating § 1 of the Sherman Act and other statutory norms. Each of the qualifications operates to permit undoing the exclusion it modifies when to do so is germane to serving one or more of the acceptable purposes delineated at NCRA § 2(a)(6). Accordingly, there is at least a superficial potency for remitting venturers' otherwise illegal conduct to the NCRA rule of reason.

Operation of the qualifications is *somewhat* analogous to the "cost justification" and "meeting competition" defenses to price discriminations otherwise prohibited by § 2 of the Clayton Act.<sup>83</sup> While these "Robinson-Patman"<sup>84</sup> defenses are absolute (even though the

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77. 15 U.S.C. § 4301(b)(1) (1984).

78. 393 U.S. 333 (1969).

79. See, *U.S. Dept. of Justice Antitrust Guide for International Operations*, (Jan. 1977), reprinted in [Jan.-June] *Antitrust & Trade Reg. Rep. (BNA)* No. 799, at E-1 (Feb. 1, 1977) and *U.S. Dept. of Justice Antitrust Guide Concerning Joint Ventures*, (Nov. 1980), reprinted in [July-Dec.] *Antitrust & Trade Reg. Rep. (BNA)* No. 992 (Special Supp.) at 6 (Dec. 4, 1980). See *infra* text accompanying notes 91-94.

80. 15 U.S.C. § 4301(b)(2) (1984).

81. 15 U.S.C. § 14 (1982).

82. 15 U.S.C. § 4301(b)(3) (1984).

83. 15 U.S.C. § 13(a)&(b) (1982).

84. *United States v. Borden Co.*, 370 U.S. 460 (1962) (cost justification); *Standard Oil*

shielded discrimination is injurious to competition<sup>85</sup>), the qualifications to NCRA § 2(b) exclusions do not have potencies beyond entitling comprehended conduct to NCRA safe harbors. Conduct permitted by a qualification, along with all other indulgences by a venture defined at NCRA § 2(a)(6), is exposed to prosecution by reference to the NCRA rule of reason.

NCRA's legislative history does not betray explicit recognition that conduct otherwise offensive *per se* to § 1 of the Sherman Act can be relegated to the NCRA rule of reason via the qualifications to NCRA § 2(b). Indeed, there are suggestions to the contrary.<sup>86</sup> Do the qualifications truly present potencies for undoing *per se* doctrines in terms of defined ventures? Response to this demands detailed consideration of NCRA § 2(b).

The text of NCRA §2(b)(1) excludes

(1) exchanging information *among competitors* relating to costs, sales, profitability, prices, marketing, or distribution of any product, process, or service that is not reasonably required to conduct the research and development that is the purpose of such venture<sup>87</sup>

from the concept of "joint research and development venture" for purposes of NCRA § 2(a)(6). Note that the basic exclusion is unconcerned with exchanges among non-competitors even though they are potential competitors. This qualified exclusion demands attention to not only precedent but also DOJ policies concerning data exchanges among actual competitors.

*U.S. v. Container Corporation of America* dealt with competitors' exchange of price data *without* agreement to adhere to any pricing mode. Defendants accounted for approximately 90% of corrugated containers marketed from plants in southeastern U.S.A. The price exchange was found "to stabilize prices though at a downward level." Justice Douglas wrote for four of a majority of five. He opined that

The continuation of some price competition is not fatal to the Government's case. The limitation or reduction of price competition brings the case within the ban, for as . . . held in . . . *Socony-Vacuum* . . ., interference with the setting of price by free market forces is unlawful *per se*.<sup>88</sup>

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Co. v. FTC, 340 U.S. 231 (1951) (meeting competition).

85. "Section 2(b) excludes classic cartel-like behavior by participants in a joint R&D venture from coverage under the Act." H.R. CONF. REP. NO. 1044, 98th Cong., 2d Sess. 8, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3132.

86. 15 U.S.C. § 4301(b)(1) (1984) (emphasis supplied).

87. 393 U.S. 333, 337 (1969).

88. *Id.* at 338.

This language was and is unfortunate. There is a potency for citation out of context to the effect that competitors' exchange of pricing data, accompanied by a stabilization effect, is offensive *per se*. The context is to the contrary. Context includes the fact that Justice Fortas, supplying the fifth vote necessary to reinstate a complaint dismissed by a trial judge, concurred in the judgment on the specific understanding that the majority opinion did not hold that competitors' exchanges of price data are offensive *per se*.<sup>89</sup> However, he stressed a perspective that such exchanges, accompanied by proof of substantial dampening of price competition, made out a rule of reason case in consequence of which there was "no need to consider the possibility of a *per se* violation."<sup>90</sup> Writing for the dissenters, Justice Marshall defended the need for a full rule of reason inquiry.<sup>91</sup>

Admitting that competitors' naked agreements to effect price stabilizations are and should be regarded as offensive *per se* to §1 of the Sherman Act, the authors suggest neither that competitors' mere exchanges of data concerning actual costs and prices are inimical to free market precepts nor that Justice Fortas' position in *Container Corporation* itself was much more than a half-way house between *per se* condemnation and the true rule of reason. Rather, the authors point to the facts that *Chicago Board* necessarily involved direct price stabilization whereby traders could avoid foolish bids and that perfect competition models presuppose perfect knowledge. In doing so, the authors admit a prejudice to the effect that, while neither a perfect data base nor perfect competition is attainable by humans burdened with imperfect perception, free market forces are prejudiced rather than fostered by restrictions on data exchanges among sophisticated persons so long as they abstain from agreements as to pricing in procurements or markets. Data exchanges are no more the occasion of violations than any other contact involving competitors. The authors acknowledge that their prejudice systems have little to do with either the state of the law or the attitudes of prosecutors. The latter consideration evokes consideration of DOJ attitudes.

In a *contemporary* context other than NCRA, DOJ personalities have expressed great concern about price-sensitive data exchanges among persons otherwise competitors in context of their

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89. *Id.* at 339.

90. *Id.* at 340. Note that Justice Jackson was one of a recent majority remitting a resale price maintenance case to rule of reason analysis when plaintiff, terminated in the wake of a competing distributor's complaints about price-cutting, failed to prove that an agreement between the complainant and the master marketer focused on resale pricing. *Business Electronics Corp. v. Sharp Electronics Corp.*, \_\_\_ U.S. \_\_\_, 1988 (Westlaw 39121) (U.S.).

91. 15 U.S.C. §§ 4012-21 (1982).

combination as applicants for a COR under ETCA Title III.<sup>92</sup> The official form pertinent to such application contains a special "note" discouraging data exchanges and suggesting that, if data are to be exchanged, they be processed through an unrelated third party.<sup>93</sup> Presumably, the third party would perform some sort of a sanitizing process.<sup>94</sup> DOJ sensitivity has translated into clauses qualifying CORs, presumably pursuant to ETCA § 303(b)(3),<sup>95</sup> to require minimization of data exchanges.<sup>96</sup> These clauses are not unlike NCRA § 2(b)(1).

To those who regard *Container Corporation* as setting a *per se* rule, NCRA § 2(b) effectively undoes it in the case of *defined* ventures in which two or more of the venturers are competitors. To those who believe that *Container Corporation* inevitably must be regarded as a rule of reason case albeit a harshly restrictive one, it would seem - again in the case of *defined* ventures involving competitors - that NCRA § 2(b) at least gives vitality to Justice Marshall's dissent in *Container Corporation*<sup>97</sup> and that, thanks to NCRA § 3, *defined* joint venturers' "reasonably required" data exchanges have escaped Justice Fortas' willingness to accept data exchanges followed by price stabilization as conclusive. Adopting an admittedly inexact analogy to exemptions practice in venues such as securities regulation,<sup>98</sup> the authors advise that venturers who wish to take advantage of the qualification to NCRA § 2(b)(1) must anticipate - by preparing a "pro-competitive" brief when forming a defined venture - ultimately having to prove that data exchanges were "reasonably required" to serve the Congressional-approved purposes set forth at NCRA § 2(a)(6).<sup>99</sup> The authors do *not* suggest that NCRA § 2(b)(1) frees otherwise competing venturers to use NCRA as a cover for collective albeit indirect fixing of prices they individually charge or pay for goods or services either beyond or comprehended by the

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92. U.S. Dept. of Commerce Form ITA 4093P (5/83), D. Unkovic, J. Maher & N. LaMont, *International Opportunities & the Export Trading Company Act of 1982*, B-2202 (1984).

93. See, e.g., *Maple Flouring Mfrs. Ass'n. v. United States*, 268 U.S. 563 (1925).

94. 15 U.S.C. § 4013(b)(3) (1982).

95. J. Maher & N. LaMont, *Export Trade Certificates of Review: Will Efficacy Be Permitted?*, 2 DICK. J. INT'L L. 241, 264 n.134 (1984), reprinted in CORP. COUNS. ANN. (Burchell, Rubenzahl & Schwartz ed. 1985).

96. See *supra* note 90.

97. Availability of a "securities" or "transaction" exemption is a defense to private suits under §12(1) of the Securities Act of 1933, 15 U.S.C. § 77(l) (1984).

98. Such homework should proceed with sensitivity to Congress' intent that "reasonably required" imports an "objective standard and thus does not refer to the subjective opinion of the participants, but rather to whether the particular circumstances at issue establish the need to exchange the type of information in question and to do so in the planned manner". S. REP. NO. 427, 98th Cong., 2d Sess. 16, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3113.

99. 15 U.S.C. § 4301(b)(2) (1984).



venture.

(b) *Restrictions agreed upon by the parties.*—NCRA § 2(b)(2) excludes

(2) entering into any agreement or engaging in any other conduct restricting, requiring, or otherwise involving the production or marketing by any person who is a party to such venture of any product, process, or service, other than the production or marketing of proprietary information developed through such venture, such as patents and trade secrets<sup>100</sup>

from the venture defined at NCRA § 2(a)(6). Unlike §§ 2(b)(1)<sup>101</sup> & (3),<sup>102</sup> the second qualified exclusion does *not* invoke a reasonability standard. Whereas NCRA §2(b)(1) reads on exchanges of data among “competitors” and is unconcerned with such exchanges among non-competitors, the basic exclusion in § 2(b)(2) looks to restrictions *inter se* agreed upon by parties to a defined venture. Thus, by definition, § 2(b)(2) does not exclude imposition of restraints on third parties and, if such restraints serve licensing under § 2(a)(6), they are subjected to only NCRA § 3 rule of reason analysis!

Once one overcomes inelegance of the qualification to § 2(b)(2)’s exclusions, one finds that it constitutes almost a forthright invitation to capitalize upon the fruits of the joint venture by negotiating restrictions on venturers’ respective discretions to use or market proprietary data (including but not limited to patents and trade secrets) developed by a defined venture. It is clear to the authors that Congress did not intend to afford NCRA safe-harbors for joint procurement, production and/or marketing ventures in and of themselves. Neither did Congress purport to condemn them. There is explicit recognition that such ventures may have “significant procompetitive aspects”.<sup>103</sup> It is equally clear to the authors that NCRA § 2(a)(6) was not intended to promote ventures beyond those essentially oriented to R&D and commercial realization upon the fruits of what is presumed to be intrinsically risky R&D. But, what do § 2(a)(6) and the qualification to § 2(b)(2) say when they are taken together?

As noted earlier,<sup>104</sup> we are taught that statutory construction begins with the statute itself. NCRA §2(a)(6) contemplates not only research, bench-scale development, reductions to practice, development and testing of “basic engineering techniques,” prosecution of

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100. See *supra* text accompanying note 86.

101. See *infra* text accompanying note 105.

102. S. REP. NO. 427, 98th Cong., 2d Sess. 15-16, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3112-3113.

103. See *supra* text accompanying note 28.

104. See *supra* text accompanying note 29.

patent applications, and licensing of know-how and patents but also full-scale albeit prototypical production and, to the degree appropriate to adequate testing, marketing of materials and services by or on behalf of a defined venture.<sup>105</sup> There is no limitation on licensees; they can be parties or strangers to the venture. What beyond this is implied by NCRA § 2(b)(2)?

This subsection addresses *parties* to ventures defined at § 2(a)(6), excluding their agreements and “other conduct” mandating “production or marketing” decisions concerning “products, processes and services” *extrinsic* to the venture’s purposes. The effect of the qualification is to permit agreements and “other conduct” whereby the parties to a venture undertake restraints upon their individual discretions concerning marketing and, seemingly, uses of formulated proprietary data “such as patents and trade secrets” developed “through” the defined venture. If one ignores potential for joint venturers to be or to become competitors, this would be a truism. However, it says much to parties to defined ventures who are actual or potential competitors.

By way of an aside, the qualification can be somewhat obscure in that “production or marketing of proprietary information developed through” the venture is insensible if one assigns the same weight to the word “production” in the qualification as the word enjoys in the main body of the exclusion. It is obvious that Congress’ purpose was directly to bless inter-venturer restrictions on their own respective production *uses* as well as marketing of proprietary data developed “through” the venture. Parties to formation of a permitted venture are not disqualified from being its licensees. One method of parsing the qualification permits a sensible conclusion in which “production . . . of . . .” data is the equivalent of “formulating” data. In any event, given the venture’s ability to license parties as well as others, it is inescapable that the qualification to NCRA § 2(b)(2) serves to permit imposition of restrictions on parties — even though they be competitors — in much the same way non-parties can be restricted. In effect, Congress blessed parties’ allocations *inter se* of the exploitative values of venture developments and ordained that such allocations be afforded NCRA rule of reason analysis.

This freedom to impose certain restrictions raises a question as to what else competing parties to a defined venture can accomplish *inter se*, through agreements or “other conduct” mandating or “otherwise involving” formulation or marketing of venture proprietary data, that otherwise might present significant antitrust difficulties. NCRA § 2(a)(6) permits *collective* licensing of proprietary data.

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105. 15 U.S.C. § 4301(b)(3) (1984).

There is neither a mandate to license nor a limitation on the terms of licenses nor a compulsion to license persons other than the venturers. On the face of the matter, § 2(a)(6) exists to permit venturers' continued collective enjoyment of fruits of collective R&D. The qualification to NCRA § 2(b)(2) surely exists to permit restraints *inter se* on venturers' marketing proprietary data of the venture and, if such marketing is permitted, the formulation of data marketed.

Licensing under § 2(a)(6) presumptively can use "field of use" and other licit restrictions. Parties to the venture are not disqualified as licensees. In effect, the qualification confirms venturers' *collective* ability not only to impose "field of use" and other usual restrictions on others' enjoyment (including use or marketing) of venture data but *prospectively* to divide the turf among the venturers. Such restrictions, of course, are intrinsic to the patent monopoly but NCRA § 2(b)(2) looks to venturers' conduct only anticipatory of achieving commercially valuable know-how and trade secrets as well as patents. By definition, there is no federal law generally protecting trade secrets and know-how as such.

(c) *Restraints imposed by § 2(b)(3).*—It is necessary to consider usual Sherman Act interfaces with technology transfers in order to fully assess the message of NCRA. Before doing so, NCRA § 2(b)(3) demands abbreviated consideration since it too deals with such transfers. Section 2(b) excludes *parties* to defined ventures from

(3) entering into any agreement or engaging in any other conduct —

(A) to restrict or require the sale, licensing, or sharing of inventions or developments not developed through such venture, or

(B) to restrict or require participation by such party in other research and development activities,

that is not reasonably required to prevent misappropriation of proprietary information contributed by any person who is a party to such venture or of the results of such venture.<sup>106</sup>

Here we see the "reasonably required" standard used in a narrower fashion than its use in NCRA § 2(b)(1).<sup>107</sup> The point of the qualification to § 2(b)(3) is to permit venturers to stay within the definition at NCRA § 2(a)(6) even though they knowingly agree on restricting their freedom of action in specified areas otherwise unrelated to the

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106. See *supra* text accompanying note 86.

107. 35 U.S.C. §§ 261 & 271 (1982).

venture *if* their purpose is to protect against misappropriation of proprietary data developed by the venture or contributed to it by a party, and the restraints are “reasonably related” to such purpose. Species of conduct external to a defined venture that can be restrained via § 2(b)(3) are not only transfers of technology developed outside the venture but also participations in R&D independent of the defined venture. The qualification seems entirely sensible in that it does little more than perpetuate a common law disposition to relax the ordinary prejudice against particularized undertakings of restraints to the degree appropriate to protecting the benefit of an otherwise legitimate bargain.

3. *A Quick Look at Patents and Know-How.*—Before dwelling further on imports of NCRA §§ 2(b)(2)&(3), a quick look at patents and know-how in the antitrust crucible is appropriate. The technique is first to remark each of them generally and then, because it is not uncommon to encounter single licenses to practice related patents and know-how, to consider leading precedent that effectively reads on both.

Implicit in a patentee’s power to exclude others from making, using or selling<sup>108</sup> is the right to allow another or others to practice under one or more of the claims allowed by the patent. The right to license is the power to permit others to practice some but not all of the allowed claims of the patent and otherwise to limit licensees’ practice within the patent monopoly. A holder of a patent can be barred from enforcing it against alleged infringers if the holder is using the patent to restrain conduct beyond the ambit of the monopoly conferred by the patent.<sup>109</sup> Conduct may be characterized as patent misuse even though it does not violate antitrust laws.<sup>110</sup> The misuse defense is available even to an infringer not directly affected by the misuse.<sup>111</sup> On the other hand, misuse may be equivalent to an antitrust violation and confer standing for an affirmative claim.<sup>112</sup> Thus, tying unpatented items to sales of patented machinery is offensive *per se* to the Sherman Act *if* a “not insubstantial” amount of

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108. *Morton Salt Co. v. G.S. Suppinger Co.*, 314 U.S. 488, 492-94 (1942).

109. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 140-41 (1969). *See* criticism of misuse doctrine in address by C. Rule, Deputy Assistant Attorney General for Antitrust before The John Marshall Law School, 14-20.

110. *See supra* note 103 at 493-94.

111. *Mercoird Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661 (1944).

112. *International Salt Co. v. United States*, 332 U.S. 392 (1947). Fuller consideration of tying is deferred to discussion in connection with § 3 of the Clayton Act, 15 U.S.C. § 14 (1982). *See infra* text accompanying notes 211-225. However, note the U.S. Department of Justice Vertical Restraints Guidelines, §§ 2-4825 (Jan. 1985) suggesting that non-price vertical restraints always are subject to rule of reason analyses and that analyses of licensing are not as rigorous as other non-price restraints. *Id.* at § 2.4.

commerce is involved.<sup>113</sup> Ordinarily, however, licensing by a holder who unilaterally determines how the patent pie is to be sliced is subject only to rule of reason analysis. There are considerable antitrust implications in doing multilaterally what a holder can do unilaterally. Thus, the fact that a product or process is patented does not ordinarily warrant the holder's combination with competitors collectively to fix royalties or to allocate markets although the holder unilaterally may be able licitly to impose not only such restraints on licensees but to restrict the prices at which they sell.

Since a holder is free to license on a territorially restricted basis within the U.S.A.,<sup>114</sup> it is permissible for a holder to refuse to license save on its unilaterally determined terms which effectively allocate markets within the U.S.A.<sup>115</sup> The same is true of product markets unilaterally allocated through "field of use" restrictions.<sup>116</sup> These consequences do not change the antitrust laws. Successful attack, under § 1 of the Sherman Act, on such allocations requires proof of agreement to allocate either by the holder with its actual (or potential) competitors or by the licensees with the holder serving as their conduit. Further, both *G.E.* doctrines<sup>117</sup> survive for which reason the pertinent patent holder (a) can negotiate with a manufacturing licensee to the effect that the holder can dictate the price of the licensee's own sale of a product covered by the patent<sup>118</sup> and (b) can set up a distribution scheme whereby the holder dictates prices to be exacted by its true agents for the purpose of sale (including agents who receive product on consignments for resale).<sup>119</sup> Of course, the propositions concerning marketing via true agents and consignments are not peculiar to patent holders.<sup>120</sup>

The *G.E.* decisions' leave for a patent holder to set its licensees' prices, however, is narrowly construed<sup>121</sup> and a master marketer's decision to market patented or unpatented goods via stocking agents is one that must pay heed to various antitrust norms.<sup>122</sup>

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113. 35 U.S.C. § 261 (1982).

114. *Ethyl Gas Co. v. United States*, 309 U.S. 436, 456 (1940).

115. *Benger Labs., Ltd. v. R.K. Laros Co.*, 209 F. Supp. 639 (E.D. Pa. 1962), *aff'd per curiam*, 317 F.2d 455 (3d Cir. 1963), *cert. denied*, 421 U.S. 988 (1975).

116. *United States v. General Electric Co.*, 272 U.S. 476 (1926).

117. *Id.* at 489-90.

118. *Id.* at 488.

119. *Simpson v. Union Oil Co.*, 377 U.S. 13, 21 (1964) (dicta); *Meisrow v. Pepperidge Farms, Inc.*, 703 F.2d 339, 341-43 (9th Cir. 1983); *Harwick v. Nu-Way Oil Co.*, 589 F.2d 806, 808-11 (5th Cir. 1979), *cert. denied*, 444 U.S. 836 (1979).

120. *United States v. Line Material Co.*, 333 U.S. 287, 299-304 (1948); *Cummer-Graham Co. v. Straight Side Basket Corp.*, 142 F.2d 646, 647 (5th Cir. 1944), *cert. denied*, 323 U.S. 726 (1944).

121. *Greene v. General Foods Corp.*, 517 F.2d 635, 652-53 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976); *Roberts v. Exxon Corp.*, 427 F. Supp. 389, 391 (W.D. La. 1977).

122. *A. & E. Plastik Pak Co. v. Monsanto Co.*, 396 F.2d 710 (9th Cir. 1968); *Thoms v. Sutherland*, 52 F.2d 592 (3d Cir. 1931).

On the face of the matter, since *G.E.* relied on existence of the holder's statutory warrant to maintain a federally-conferred monopoly as the basis for permitting a price-restrictive license, desires for protection entertained by proprietors of production know-how (and lesser proprietary data such as knowledge of customers' peculiarities) are not so well grounded. Equitable and legal remedies normally available to proprietors of trade secrets are for the purpose of avoiding, or affording damages for, tortious invasions of proprietary rights but there is no legal guaranty against the successful reverse engineer's practice. Even if a trade secret or know-how has been resistant to reverse engineering or other legitimate method of destroying its proprietary nature, it always is subject to discovery. Patentees' rights are protected for a defined number of years as society's reward for the inventor's disclosures. By definition, the proprietor of a trade secret maximizes its value by non-disclosure to the public. Implicit in this is a potency for protection well beyond the limited life of a patent. There is no obvious analogy between the absolute legal monopoly for a term of years enjoyed by the patentee and the *de facto* monopoly of the trade secret which may last forever or dissolve tomorrow. In fact, on a technological plane, patents and trade secrets can be said to be philosophically opposed. However, data protectable as a trade secret may and often does extend well beyond that patentable or otherwise truly protectable under current federal law. The patent system's predicate of inducing disclosure aims at discouraging maintenance of trade secrets. Further, technological trade secrets inevitably relate to processes.

From this, it follows that price restrictions in know-how licenses are not justifiable on the theory that sustained the *G.E.* price restriction and agency holdings. On the other hand, restraints against a know-how licensee's further revelation of data are entitled to rule of reason analyses because they are qualified grants of property as are field of use and geographic restrictions.<sup>123</sup> However, those licensing know-how must be alert to attitudinal problems such as that nicely summed in *A&E Plastik Co. v. Monsanto Co.* in which the Ninth Circuit said

the critical question in an antitrust context is whether the restriction may fairly be said to be ancillary to a commercially supportable licensing arrangement, or *whether the licensing scheme is a sham* set up for . . . controlling competition while avoiding the consequences of the antitrust laws.<sup>124</sup>

They also should recall that the classic characterization of resale

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123. 396 F.2d at 710, 715.

124. *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

price maintenance as offensive *per se* to § 1 of the Sherman Act came out of a context in which the proprietor of a trade secret sought to enforce a resale price maintenance agreement against one who knowingly interfered with it.<sup>125</sup> This contrasts sharply with protection afforded a price-restricted license, *under a patent*, against a knowing interference.<sup>126</sup>

4. *Technology Transfers: Precedents and per se Antitrust Violations.*—With this background, it is useful to consider various technology transfer precedents. Earlier, price restraints saved by *G.E.* from *per se* condemnation were remarked.<sup>127</sup> Now, it is necessary to state what *G.E.* does not protect. *G.E.* does not permit the patent holder to fix prices of unpatented products of patented processes or machines.<sup>128</sup> *G.E.* does not permit fixing *resale* prices.<sup>129</sup> Neither does it permit the holder to be a participant in a concert of holders or licensees or both, to fix prices.<sup>130</sup>

In *Line Material*, the Supreme Court refused to extend *G.E.*'s teaching concerning a patent holder's unilateral imposition of a price-fix on a manufacturing licensee to a situation involving price-restrictive sublicensing by cross-licensees holding individual patents for an electrical device and an improvement thereon. The improvement patent could not be practiced without infringing the device patent. While the cross-licenses were royalty-free to the respective holders, they granted the improvement patent holder exclusive rights to sub-license third parties on a price-restrictive basis which pricing the device patent holder undertook to respect. So joining, "to maintain prices on their several products," was held to be "unlawful *per se*."<sup>131</sup>

Field of use restrictions unilaterally imposed on manufacturing licensees involve distinctions similar to those in *G.E.* Thus, *General Talking Pictures* confirmed availability of an infringement action against a purchaser of a patented device from a use-restricted manufacturer-seller when each of the licensee and its customer knew that the purchaser would put it to uses reserved by the licensor.<sup>132</sup> Essentially the same restriction was upheld by a Court of Appeals in *Au-*

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125. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, *aff'd on rehearing*, 305 U.S. 124 (1938).

126. *See supra* text accompanying notes 116-118.

127. *Cummer-Graham Co. v. Straight Side Basket Corp.*, 142 F.2d 646, 647 (5th Cir. 1944), *cert. denied*, 323 U.S. 726 (1944).

128. *Ethyl Gas Corp. v. United States*, 309 U.S. 436 (1940); *United States v. Invis Lens Co.*, 316 U.S. 241 (1942).

129. *United States v. Line Material Co.*, 333 U.S. 287 (1948).

130. *Id.* at 293-97, 305-15.

131. *See supra* note 125 at 181.

132. *Automatic Radio Mfg. Co. v. Hazeltine Research*, 176 F.2d 799, 802-03 (1st Cir. 1949), *aff'd on other grounds*, 339 U.S. 827 (1950).

*tomatic Radio Mfg. Co. v. Hazeltine Research* but the Supreme Court did not reach the issue.<sup>133</sup> The *General Talking Pictures* situation must not be confused with that in which a patentee markets patented products subject to conditions restricting purchasers' use of the product in which case the sale may be held to have exhausted the patent monopoly. Nonetheless, ability licitly to restrict uses of licensed patented processes or of leased equipment embodying a process patent or, in certain commercial circumstances generated by unintegrated inter-brand competition,<sup>134</sup> patented products is not *carte blanche* for all of the games a technology marketer may play.

Patent holders' unilateral impositions of output ceilings on licensees are subject only to rule of reason analyses<sup>135</sup> but being party to or a conduit for multilateral adoption of quotas would not be shielded by patents. Tying, under certain circumstances,<sup>136</sup> has been characterized a *per se* offense. If the seller uses a patent position to compel purchase of other patented or unpatented goods or services as a condition of access to a patent monopoly, the tying patent (or copyright) satisfies the "sufficient economic power" element of proof.<sup>137</sup> Yet, it would seem inescapable that a *defined* venture's ties *via* a license from the venture has been relegated to the NCRA rule of reason.

DOJ's now antiquated 1980 *Antitrust Guide Concerning Research Joint Ventures*<sup>138</sup> was oriented to minimizing "fears, possibly unwarranted, of exposure to antitrust attack."<sup>139</sup> In the *Introduction* to the *Guide*, DOJ remarked that

it is useful to distinguish between three different kinds of effects on competition. The first is the effect that the essential elements of the joint research project would have in lessening existing and potential competition between the participating firms. If the joint activity has some probable and significant (non *de minimis*) anticompetitive effect, the question becomes whether the venture is, on balance, pro-competitive, taking into account all aspects economically and technically necessary for

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133. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (non-patent) (territorial restraints on vendees' resales are to be tested by the rule of reason).

134. *United States v. E.I. duPont de Nemours & Co.*, 118 F. Supp. 41, 226 (D. Del. 1953), *aff'd on other grounds*, 351 U.S. 377 (1956); *Q-Tips, Inc. v. Johnson & Johnson*, 109 F.Supp. 657 (D. N.J. 1951), *modified*, 207 F.2d 509 (3d Cir. 1953), *cert. denied*, 347 U.S. 935 (1954).

135. *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984). See *infra* text accompanying notes 214-218 and 221-225.

136. *United States v. Loew's Inc.*, 371 U.S. 38, 45 (1962) (copyright).

137. U.S. DEPT. OF JUSTICE ANTITRUST GUIDE CONCERNING RESEARCH JOINT VENTURES (Nov. 1980), *reprinted in* [July-Dec.] *Antitrust & Trade Reg. Rep. (BNA)* No. 992 (Special Supp.) (Dec. 4, 1980) [hereinafter ANTITRUST GUIDE].

138. *Id.* at 2.

139. *Id.* at 3.



its success. Second, the project agreement, or other related agreements between the participants, may contain specific restrictions that restrain competition. If these restrictions are not unreasonably ancillary to the essential elements of the project or are of undue scope or duration, they, too, will present major antitrust concerns. Finally, limitations on access to participation in joint research or to the fruits of that research may present antitrust problems if the effect of those limitations is to create or abuse market power in the hands of the joint venturers. Each of the three kinds of effects will be considered in turn.<sup>140</sup>

Addressing "collateral restraints (non-patent)," DOJ conceded that their "legality . . . is largely a function of the proximity of their relationship to the essential purposes of the joint research venture, as well as their not having excessive scope or duration."<sup>141</sup>

Pertinence of NCRA §§ 2(b)(2) & (3) becomes apparent when one reads that the *Guide's* examples of usually tolerated "closely related collateral restraints" include:

the obligation to exchange any results from research undertaken previously in the field of the joint research, the duty not to disclose results of the joint research to outside parties until patents are obtained, and the division of particular aspects of the research between the venturers.<sup>142</sup>

To this degree, NCRA §§ 2(b)(2) & (3) are an authoritative restatement. The *Guide* recognized that such restraints are "generally reasonably necessary" for conduct of joint research and ordinarily would not have "significant anticompetitive impact".<sup>143</sup> Agreements to collaborate at a level more remote from "mere research efforts, resulting in projects which closely approximate joint manufacturing ventures or even mergers" were frowned upon. If such agreements were "reasonably necessary," however, limitation "to the results of the joint research," without encompassing "other competing products or services marketed by the cooperating firms," was commended "unless these other joint activities can be justified on their own by a separate joint venture analysis."<sup>144</sup> A stronger line was taken toward any agreement "collateral to research undertaken by *competing* firms that divides the market as to customers served or fixes prices charged for products and services of the venturers" which was styled "as a *per se* violation of the antitrust laws."<sup>145</sup> Among the authori-

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140. *Id.* at 5.

141. *Id.*

142. *Id.*

143. *Id.* at 5-6.

144. *Id.* at 6.

145. *Id.* at 6 n. 1.

ties cited<sup>146</sup> was *Timken Roller Bearing Co. v. U.S.*<sup>147</sup> Interestingly, in 1985, DOJ announced a disposition to terminate the decree in *Timken*.<sup>148</sup> What did the *Guide* say of other restraints only slightly related or unrelated to a joint research ventures' purposes?

An agreement by [venturers] to forego independent research in competition with the joint venture *may* constitute an unreasonable competitive restraint. The sharing of confidential information about costs of production, or similar matters not closely related to the research undertaken could also tend to eliminate competition among joint venturers . . . . Similarly, the pooling of confidential information, such as product introduction dates, while questionable even on an ordinary research joint venture, is especially suspect in a joint venture dealing with *externalities*, for it can enable the venturers to prevent any of their number from picking up the pace of innovation by making available a product or process of which the other joint venturers are unaware.<sup>149</sup>

"Externalities" have to do with the environment and efforts to comply with government standards regulating effluents and emissions.<sup>150</sup> There is no concern in NCRA for the conspiracy theory of history comparable to the *Guide's* projection of plots to retard controls against environmental degradation.

At this point, it is appropriate to remark an important portion of NCRA's legislative history:

The joint granting of licenses or the refusal to grant licenses by participants in a joint R&D program is within the scope of the Act - as are restrictions on such licenses reasonably required to prevent misappropriation of proprietary information contributed by any participant or of the results of the program . . . . Joint ventures in production and marketing are not, of course, necessarily anticompetitive; indeed, they may have significant procompetitive aspects. But this legislation is not directed to these joint ventures. *However, the sale or licensing of patents, know-how, or other proprietary information that are developed through a joint R&D program may constitute part of the program.* Obviously, marketing this intellectual property may be the ultimate goal and a key financial aspect of a joint R&D program and is rightfully viewed as an integral part of it . . . . As used [in qualifications to what became the NCRA § 2(b)

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146. 341 U.S. 593, 598 (1951).

147. *Department of Justice*, released May 20, 1983. (Copy on file with the author.)

148. See *supra* note 137, at 6 (emphasis supplied).

149. *Id.* at 5.

150. S. REP. NO. 427, 98th Cong., 2d Sess. 15-17, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3112-3113 (emphasis supplied).

exceptions] *the term "reasonably required" denotes an objective standard and thus does not refer to the subjective opinion of the participants, but rather to whether the particular circumstances at issue establish the need to exchange the type of information in question* and to do so in the planned manner. For example, under this standard any exchange of information that results in an agreement or that represents concerted action toward an agreement to fix prices *for goods or services* would *never* be reasonably required by a joint R&D program . . . . Few firms will make significant contributions to joint R&D programs if they cannot be assured that monetary support or technical know-how that they contribute to the program will not be appropriated by others and used outside the joint program against them. For example, one participant in a joint R&D venture might convert what is essentially the product of the joint R&D program to his own exclusive use. Accordingly, the exclusion [to what became NCRA § 2(b)(3)] makes proper allowance for covenants in joint R&D programs that are reasonably required to protect the participants' investments.<sup>151</sup>

These words addressed a precursor to NCRA § 2(b) but the ultimate conference committee explicitly adopted them.<sup>152</sup>

NCRA § 2(a)(6) obviously contemplates that the *activities* of a defined joint venture, which acquires or achieves patent and other proprietary positions, can include licensing not only third parties but also the venturers themselves. This being the case, hasn't the venture assumed such a personality *per* NCRA § 2(a)(6) that the venture individually or, if the venturers have chosen to dispense with centralized management of a joint venture vehicle, the venturers collectively can take advantage of the *G.E.* holding concerning hitherto unilaterally designed price-restricted licenses? Has not *Line Material* been undone as conduct permitted *the venture* defined at NCRA § 2(a)(6), buttressed by the qualification within § 2(b)(2), is relegated to the NCRA rule of reason?

Quite apart from the reader's answer to these not quite rhetorical questions, is it not clear that NCRA — in the interest of maximizing return to the venture — rebuts any unfavorable pre-disposition of DOJ to allocating markets through field of use or geographic restrictions, or both, imposed by defined ventures upon venturer-licensees and their sub-licensees? The answers to these questions seem entirely parallel to affording NCRA rule of reason analysis to data exchanges among competitors collaborating in a mode contem-

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151. H.R. CONF. REP. NO. 1044, 98th Cong., 2d Sess. 8, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3132.

152. 15 U.S.C. § 13(a) (1982).

plated by NCRA § 2(b)(1). Maximizing these potencies presupposes alertness of the venturers, when initially undertaking organization and thereafter memorializing it, to formulating and to preserving proper statements of purposes within the broad sweep of NCRA § 2(a)(6) as well as to explicitly relating activities within the qualifications to NCRA § 2(b) to serving the overall purposes. An operating analogy to "cost justification" under the Robinson-Patman Act<sup>153</sup> suggests itself. After-the-fact development of cost justification rationales are not effective. After-the-fact development of rationales concerning application of qualifications to NCRA § 2(b) will not be any more compelling.

Returning to the DOJ *Guide* as it relates to "collateral restraints (patent and know-how)," there was recognition that cross-licensing of patents and exchange of know-how may be

particularly necessary, for instance, when a 'blocking' patent that would prevent research or development is held by one of the partners. It is not unreasonable under such circumstances to limit the use of the contributed patents to that field at which the research is directed if it is a clearly separate field of use.<sup>154</sup>

This, of course, is consistent with the spirit of NCRA. But the *Guide* went further, on the explicit level, by acknowledging that it is "normally permissible for the partners to agree to exchange all technical information directly relevant to the success of the project gained by their independent research efforts during the pendency of the venture."<sup>155</sup> The *Guide* also advised that agreements "in licenses between the venturers such as ones obligating them not to undercut each other's prices or not to solicit each other's customers are *per se* antitrust violations."<sup>156</sup> This is in accord with respected authorities<sup>157</sup> but, if a joint venture defined at NCRA § 2(a)(6) can impose price restrictions à la G.E. on licensees and the venturers themselves are permissible licensees, it continues to seem that *Line Material*<sup>158</sup> not only is undone but is necessarily undone by the NCRA § 3 rule of reason applicable to a defined venture.

Since NCRA § 2(a)(6) contemplates that venturers may establish "facilities for . . . prosecuting . . . applications for patents and the granting of licenses for the results of such venture," it seems that joint R&D venture vehicles so endowed with licensing power have been equated with monoliths such as the licensor in *G.E.* to the ef-

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153. See *supra* ANTITRUST GUIDE, note 137, at 6.

154. *Id.*

155. *Id.*

156. *Hartford-Empire Co. v. United States*, 323 United States 386 (1945); *United States v. U.S. Gypsum Co.*, 333 U.S. 364 (1948).

157. *United States v. Line Material Co.*, 333 U.S. 287 (1948).

158. 15 U.S.C. § 2 (1982).

fect that such vehicles can negotiate price-restrictive licenses under their own proprietary positions and, through sensibly-defined use restrictions and geographic allocations, effectively minimize competition among the venturers and others to the degree enjoyment of the fruits of NCRA-blessed "cooperative research" are concerned.

5. *Section 2 of the Sherman Act.*—There seems little point to developing considerable background concerning § 2 of the Sherman Act.<sup>159</sup> It has not occasioned generation of *per se* theories. Acknowledging that it is conceivable that activities of a joint venture defined at NCRA § 2(a)(6) could become subject to attack as monopolization, it is nevertheless appropriate to note that an anomalous effect of NCRA § 3 is to visit its "rule of reason" upon prosecutors of monopolization theories.

It would seem therefore, that the "presumptive illegality" supposedly implicit in *deliberately* amassing or defending a 70 % share of an appropriately defined market<sup>160</sup> has gone by the boards in the case of a venture within the definition at NCRA § 2(a)(6). It follows that defined ventures are not to be judged by possession of monopoly power alone for which reason *U.S. v. Krasnow*<sup>161</sup> and *U.S. v. National Lead Co.*<sup>162</sup> are not entirely pertinent to NCRA § 3 prosecutions. Even more affected is the rule implicit in *Zenith Radio Corp. v. Hazeltine Research, Inc.* as it addressed exclusive and effectively restraining patent pools *in the absence of classic monopoly power*.<sup>163</sup>

On the other hand, given relevance of the "specific intent" element in *attempts* to monopolize<sup>164</sup> and all that is implicit in the "overt act" element of conspiracies to monopolize,<sup>165</sup> it would not appear that prosecutors of attempt or conspiracy to monopolize theories against defined ventures would be newly burdened since the rule of reason as defined in *Chicago Board*<sup>166</sup> does not operate to shield defendants possessed of anticompetitive ambitions and it seems that NCRA § 3 has not changed those ground-rules.

### C. Clayton Act Implications

The Clayton Antitrust Act both amended and supplemented the Sherman Act. Enacted shortly after FTCA, the Clayton Act pro-

159. *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945); *United States v. Utd. Shoe Mach. Co.*, 110 F.Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

160. 143 F. Supp. 184 (E.D. Pa. 1956), *aff'd per curiam*, 335 U.S. 5 (1957).

161. 63 F. Supp. 513, 531-32 (S.D.N.Y. 1945), *aff'd* 332 U.S. 319 (1947).

162. 395 U.S. 100, 114 n.8 (1969).

163. *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905).

164. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940).

165. See *supra* text accompanying note 65.

166. See *supra* text accompanying notes 137-157.

vided not only ordained substantive rules of decision but also provided civil remedies for violation of substantive rules embodied in the Sherman Act and other statutes as well as the Clayton Act. The treble damage action is one of the civil remedies. Principal substantive thrusts of Clayton were at particularized species of commercial conduct to the degree they presented a probability of injury to competition. Later amendments not only altered substantive rules but elaborated specialized industrial jurisdictions of various federal agencies and prescribed certain reporting requirements. Alteration of substantive rules included characterizations of certain conduct as unlawful even though there is no demonstrable potency for adverse effect on competition. Of the Clayton Act's substantive rules, this Part III.C of the article treats only of §§ 2 (certain commercial discriminations and kick-backs), 3 (certain seller or lessor imposed restraints on "customer" conduct), 7 (certain acquisitions) and 8 (certain interlocks) but not in that order.

In qualitative terms, of NCRA's principal impact on Clayton Act norms relates to its § 7. Burdened by a popular mischaracterization as an anti-merger statute, § 7 looks to acquisitions of not only enterprises and interests in enterprises but also, more starkly, assets. Not unduly limited by the techniques of acquisition, the statute can be applied to joint ventures just as it can be applied to mergers and asset acquisitions. While one may infer that NCRA's impact on § 7 is intentional and (given the legislative purpose of NCRA) sensible, such inferences concerning §§ 2 and 7 are more difficult.

1. *Section 7 of the Clayton Act.*—Repeated references to the DOJ *Research Joint Venture Guide*<sup>167</sup> provide a basis for shifting to preliminary consideration of structuring joint ventures within NCRA § 2(a)(6). Although it is crystal clear that § 7 of the Clayton Act embraces joint ventures implemented by erection of incorporated or limited partnership<sup>168</sup> or Massachusetts trust vehicles in which venturers receive equity participations in exchange for their investments or pledges of investment, appropriateness of the niceties of § 7 analyses to joint ventures analogous to general partnerships is far from settled. The *Guide* noted that a "joint research project that is purely contractual and involves no acquisition of any asset does not come within the scope of section 7 but would be subject to Section 1 of the Sherman Act."<sup>169</sup> This, of course, is so hedged as to constitute a truism. Ignoring, for the moment, the fact that NCRA § 2(a)(6)

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167. Note that the U.S. Dept. of Commerce has been promoting organization of R&D limited partnerships. U.S. CONG. OFFICE OF TECHNOLOGY ASSESSMENT, INFORMATION, TECHNOLOGY R&D, CRITICAL TRENDS AND ISSUES 33 (1985).

168. See ANTITRUST GUIDE, *supra* note 137, at 3.

169. 15 U.S.C. § 18 (1982).

almost cries out for implementation by creation of an incorporated vehicle that in its turn can become a party to the master joint venture agreement, the language of § 7 of the Clayton Act<sup>170</sup> is curious in terms of its applicability to general partnerships undertaking research and development or any other business.

(a) *Application of § 7 to joint ventures formed and operated as general partnerships.*—The Clayton Act defines “person” to include corporations and associations “existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any state, or the laws of any foreign country.”<sup>171</sup> It is arguable that an *intentional* general partnership<sup>172</sup> is purely a creature of contract and thus does not exist “under or [as] authorized by the laws of” a sovereign.<sup>173</sup> Such a line of argument would have to cope with popularity of the Uniform Partnership Act (UPA) among the states. The argument probably would note that the general purpose and effect of UPA are merely to supply terms for internal government of partnerships to the extent partners have failed to be so far-sighted<sup>174</sup> and to protect creditors’ rights.<sup>175</sup> From this standpoint, it can be seen that UPA is purely regulatory rather than essentially enabling. However, general partners are inevitably persons under the Clayton Act and it would seem that — in economics and at law — acquisition of an equity participation in a general partnership is also acquisition of an asset (in the senses of an absolute right to fiduciary duties from each partner<sup>176</sup> and a contingent claim upon the assets of each partner for the purposes of satisfying claims successfully prosecuted by third parties under UPA §§ 13, 14 and 15) for which reason even a joint venture à la general partnership may be characterized as subject to § 7 of the Clayton Act.

Obviously, it is not essential in this article to resolve the question of amenability of acquisitions of interests in general partnerships to § 7 of the Clayton Act. What is more remarkable about the interface of § 7 and NCRA is the fact that § 7 condemns comprehended acquisitions when “in any line of commerce in any section of the country, the effects of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”<sup>177</sup> This “competitive injury” standard may be applicable quite without reference to the acquirer’s purposes although, if demonstrably anticompetitive,

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170. 15 U.S.C. § 12 (1982).

171. As opposed to one deemed to exist by virtue of fact-findings under §§ 6(1) and 7 of the Uniform Partnership Act (UPA).

172. 15 U.S.C. § 12 (1982).

173. UNIF. PARTNERSHIP ACT §§ 18-27, 6 U.L.A. 013-358 (Masters Edit. 1969).

174. *Id.* at §§ 9-17, 40, 6 U.L.A. 133-212, 408-509 (Masters Edit. 1969).

175. *Id.* at § 21, 6 U.L.A. 258-84 (Masters Edit. 1969).

176. 15 U.S.C. § 18 (1982).

177. *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966).

they are relevant. Further, although this "competitive injury" standard looks to probabilities, courts (including the highest one) have seemed to be somewhat fearful of the burdens implicit in qualitative analysis<sup>178</sup> and quite willing to jump from statistics demonstrating a lessening in the number of competitors or a trend toward concentration of market power to a qualitative conclusion. They did so in contexts of perceived accelerated trends to concentration and a belief that Congress is in favor of a nation of small entrepreneurs.<sup>179</sup> The effect of such decisional processes was substitution of *possibility* of injury to the competitive process for the *probability* of such injury.<sup>180</sup> Although the Supreme Court belatedly signaled a willingness for lower courts to entertain qualitative *defenses*<sup>181</sup> and the versions of the so-called *Merger Guidelines* issued by DOJ during the Reagan administration tend to pay more respect to qualitative considerations than did the courts, unfortunate judicial precedents have not been removed from the books and the *Guidelines* are neither law nor even estopping on the government.<sup>182</sup>

Embrace by NCRA § 3 of *all* federal antitrust laws<sup>183</sup> is most significant. Those who would challenge either the organization of venture defined at NCRA § 2(a)(6) or the later investment in it by a new venturer would seem burdened by addressing not only the loose competitive injury standards of § 7 of the Clayton Act but also standards explicit and implicit in the NCRA rule of reason. While *Chicago Board's* rule of reason countenances consideration of probabilities,<sup>184</sup> it neither has been used to permit substitution of mere possibilities for probabilities nor does it foreclose close attention to defendant's purposes. No less can be said of NCRA § 3.

Applicability of § 7 of the Clayton Act to *at least* those joint ventures employing an incorporated vehicle is a given. The effect of NCRA §§ 2(a)(6) and 3, taken together, is such as to make it quite unnecessary to belabor the question of whether § 7 reaches a joint R&D venture formed and operated as a general partnership. NCRA § 3 explicitly embraces "antitrust laws" including § 7 of the Clayton Act. Thus, it is the NCRA rule of reason rather than § 7 of the Clayton Act and pertinent parts of the Sherman Act under which

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178. *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 312-23 (1962) [hereinafter *Brown Shoe I*].

179. Compare *Brown Shoe I*, *supra* note 170, at 343 with *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

180. *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974).

181. Although, it cannot be gainsaid that the Guidelines may embarrass a plaintiff complaining of an acquisition. *Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc.*, 414 F.2d 506 (3d Cir. 1969).

182. See *supra* text accompanying notes 45-52.

183. See *supra* text accompanying note 65.

184. See *supra* note 177.



will be gauged competitive implications of combinations of persons — whether or not otherwise competitors — in R&D joint ventures defined at NCRA § 2(a)(6).

(b) *§ 7 and the competition concept.*—What is the significance of this displacement of the Clayton Act's § 7? Literature concerning § 7, and the philosophies said not only to underly it but to guide its application, is legion. There can be little doubt that some successful prosecutions under § 7 were of dubious social value.<sup>185</sup> Although so-called "Merger Guidelines" issued during the Reagan administration demonstrate greater respect for competition as a qualitative concept than is apparent in leading decisions prior to 1974,<sup>186</sup> unfortunate judicial precedent has not been erased by the *Guidelines*. They do nothing save signal the line of thought pursued by those currently entrusted with *part* of the enforcement power. When one addresses formation of a long-term combination, reliance on the *Guidelines* is reliance on the circumspection of prosecutors<sup>187</sup> as yet unappointed by regimes as yet unelected. Even so, private suitors have not endorsed the *Guidelines* which purport only to guide enforcement decisions by public officers.

While classic applications of § 7 have related to acquisitions in the horizontal and vertical arrays, it also has been applied to so-called conglomerate acquisitions.<sup>188</sup> Horizontal combinations are subject to condemnation on showings that develop such a low order of probability of injury to competition that it would be fairer to speak of mere possibility.<sup>189</sup> Analyses of vertical and conglomerate acquisitions concentrate on a more substantial potential for foreclosure of competitors from suppliers/customers and creation of undue leverage over resources/outlets. Whether dealing with horizontal, vertical, or conglomerate combinations, prosecutors under § 7 have no *need* to show anticompetitive purposes of those acquiring or combining. Congress' § 7 concern is for competition "in any line of commerce in any part of the country". Hence, given definition of a relevant *product* or *service* market, there is significant potential for artificially maximizing the combination's market share (and, therefore, its presumed threat to competition) by narrow definition of geographic zones of competition.<sup>190</sup>

Precedent under § 7 reveals little explicit judicial attention to the *quality* of competition, particularly in connection with horizontal

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185. See *supra* note 180.

186. *United States v. Dotterweich*, 320 U.S. 277, 285 (1943) (food & drug).

187. See, e.g., *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965).

188. See *supra* notes 177 and 179.

189. See, e.g., *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966).

190. See *supra* note 179.

integration. In context of emphases on market share and other quantitative data including trends toward concentration, it often was made to appear that the true § 7 measures of the vitality of competition are the numbers of competitors and relative market shares of those who would survive the acquisition or other combination in question. Thus, if there is a concentration of effective competitors on a given level of the exploitation-refinement-distribution chain, or even if there is a marked *trend* toward such a condition, precedent indicates that the prosecution need prove only the *likelihood* that acquisition of an actual or potential competitor will present a greater *risk* that surviving major participants will have *greater* market power.<sup>191</sup> Albeit unlabeled as such, such a showing amounts to presumptive illegality.

Congress' generic purpose in enacting substantive provisions of the Clayton Act is said to have been to address, in their incipency, arrangements that might mature into Sherman Act violations. Judicial concern for *likelihood* of a *risk* of *greater power* seems to look to "incipient incipencies" other than those reserved to FTC<sup>192</sup> rather than a true probability of injury to competition. Should the prosecution lack ability to sell a *perception* of industrial concentration or a trend to it, prosecutors must be prepared to develop a probability of injury to the competitive *process* that is considerably more certain than the *likelihood* of a *risk* of *greater* market power becoming available to the acquirer. Happily, in the mid-seventies, the Supreme Court evoked more judicial care although it did so by crediting a *defensive* showing that the quality of competition was unprejudiced despite dramatically increased concentration in an arbitrarily defined product market.<sup>193</sup> The Court has not had occasion to elaborate its implicit appeal to realism.

While DOJ's *Merger Guidelines* have become more sensitive to the concept that quantitative data have meaning only in terms of qualitative effect, practitioners cannot lose sight of the facts that the *Guidelines* neither estop public prosecutors nor have life necessarily succeeding a given political administration. The latter consideration is accentuated by precedent demonstrating that it is feasible to attack an acquisition decades after the event.<sup>194</sup> Further, although the *Guidelines* have potency to embarrass public prosecutors,<sup>195</sup> they

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191. Maher, *Two Little Words and FTC Goes Local*, 80 DICK. L. REV. 193, 211 n.119 (1976), reprinted in 1 CORP. COUNS. ANN. 541, 561 (H. Friedman, J. O'Brien, & H. Schlogam ed. 1977) (referring to the effect of FTC v. Brown Shoe Co., 384 U.S. 316, 321-22 (1966) [hereinafter *Brown Shoe II*]).

192. See *supra* note 180.

193. *United States v. E. I. duPont de Nemours & Co.*, 353 U.S. 586 (1957).

194. See *supra* note 181.

195. 334 U.S. 495 (1948).

lack that value vis-a-vis private plaintiffs under § 7.

NCRA § 3 has great significance in terms of avoiding the sloppy precedent elaborating § 7 of the Clayton Act as well as the addresses of §§ 1 and 2 to joint ventures. While DOJ merger, joint research venture, and international operations guides are sympathetic to joint R&D, they are neither law nor more than politically transitory. NCRA § 3 is law which ordains that ventures defined by NCRA § 2(a)(6) are to be tested by the NCRA rule of reason. Those who object to either the fact or the progress of a venture defined at NCRA § 2(a)(6) will be burdened to a degree significantly greater than prosecutors entitled to invoke § 7 of the Clayton Act. Indeed it seems that that the rigor of *U.S. v. Columbia Steel Co.*,<sup>196</sup> modified only by NCRA §3, will provide guidance for analyses of the formation of joint R&D ventures.

The NCRA § 3 rule of reason implicitly includes venturers' purposes among "relevant factors affecting competition" just as surely as it includes all other "factors affecting competition" including, most significantly, "effects on competition in properly defined relevant research and development markets."<sup>197</sup> Venturers' procompetitive purposes, and probable as well as actual procompetitive effects of their R&D venture, will be as susceptible of defensive use as alleged anticompetitive purposes and potencies are of prosecutorial significance. In this equation alone is a great difference from litigation conducted under § 7 of the Clayton Act. The magnitude of the difference is accentuated when one recognizes that attack on the fact or continued operation of an NCRA § 2(a)(6) venture must entail proof *inter alia* of actual (presumably adverse) "effects on competition in . . . relevant research and development markets". Thus, there is a significant displacement of the numbers game played under § 7 of the Clayton Act, particularly when one focuses on joint R&D by persons otherwise competitors.

2. *Section 8 of the Clayton Act.*—Assuming that a joint venture within the definition of NCRA § 2(a)(6) is implemented via an incorporated venture vehicle, the strictures of § 8 of the Clayton Act could come to bear rather quickly. It provides *inter alia* that

no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus and undivided profits aggregating more than \$1,000,000, engaged in whole or part in commerce, . . . if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by

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196. See *supra* note 44.

197. 15 U.S.C. § 19 (1982).

agreement between them would constitute a violation of any of the<sup>198</sup>

Sherman Act, antitrust provisions of Wilson Tariff Act, and the Clayton Act.<sup>199</sup> Obviously, one million dollars is a lot less now than it was in 1914 but Congress has not seen fit to inflation-effect § 8. Purely and simply, prosecutions of § 8 theories in connection with interlocks between an incorporated joint venture vehicle and an incorporated venturer (pursuant to a venture defined at § 2(a)(6) of NCRA) have been subjected to the NCRA § 3 rule of reason.

Section 8 of the Clayton Act aims principally at interlocking directorates between or among *incorporated* competitors which are *in* commerce. It does so by prohibiting individuals from serving as a director of more than one corporation within certain classes of competing enterprises. Prosecutions under § 8 are relatively rare.

Ignoring its address to banking institutions and certain common carriers, the essential point of §8 is to prohibit individuals from simultaneous service as a director of two or more such corporations engaged in commerce that are *or have been* competitors to a degree that the corporations' agreed elimination of competition *would* violate federal antitrust laws specified in the Clayton Act. There is no explicit exception for interlocks between or among incorporated subsidiaries of a common parent or parents. While the potential for foreclosure of an insignificant amount of competition may be held *de minimus*, the ban is not avoided by the fact that a substantial volume of competing sales is insignificant in context of the affected enterprises' total operations.<sup>200</sup>

Subsuming the "in commerce" nexus, § 8 of the Clayton Act by its own terms does not relate to a joint venture unless (i) two or more of the venturers are incorporated, (ii) they organize an incorporated joint venture vehicle, and (iii) directors of the incorporated venturers also serve as directors of the venture vehicle. On the face of the matter, planning a joint venture can avoid § 8 difficulties without much difficulty by merely dispensing with element (ii) or (iii). However, if the venture is one defined at NCRA § 2(a)(b), it is a given that § 8 of the Clayton Act is modified by NCRA § 3 with the consequence that the little consideration to be given to implications of interlocking boards will be in context of the NCRA "rule of reason".

### 3. Section 2 of the Clayton Act.—Since § 2 of the Clayton

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198. 15 U.S.C. § 12(a) (1982).

199. *United States v. Sears, Roebuck & Co.*, 111 F. Supp. 614 (S.D.N.Y. 1953).

200. 15 U.S.C. § 13(a),(d)-(f) (1982).

Act is concerned with price and other commercial discriminations,<sup>201</sup> it is not of interest peculiar to joint ventures. Assuming, however, that test marketing is embraced within activities permitted a defined venture, there is a real potency for NCRA § 3 to work unanticipated magic on classic "Robinson-Patman" theorems.

Unlike §§ 3<sup>202</sup> and 7<sup>203</sup> of the Clayton Act, its §§ 2(c),(d) & (e) lack "competitive injury" standards.<sup>204</sup> Therefore, if the reader will permit, they define statutory *per se* offenses. But, if a venture defined by NCRA § 2(a)(b) accommodates test marketing of product by paying "phony brokerage"<sup>205</sup> or affording disproportionate merchandising supports to competing customers,<sup>206</sup> the NCRA rule of reason is applicable!

§ 2(a) of the Clayton Act, the basic *civil* price discrimination statute,<sup>207</sup> is addressed to sellers of commodities. The statute has three alternate competitive injury standards of which none deals directly with sellers' purposes. They look to probabilities of injury to the competitive process occurring at the level of the discriminating seller's competitors ("primary level"), at the level of a disfavored customer itself competing with a favored customer ("secondary level") and at the level of sub-customers ("tertiary" level"). While § 2(a) prosecutions alleging injury at the primary level tend to evoke evidence of seller's anticompetitive purpose as germane to the probability of injury,<sup>208</sup> discrimination among competing customers tends to speak for itself.<sup>209</sup> The NCRA § 3 rule of reason, by definition, will burden prosecutions of NCRA-defined ventures under § 2(a) of the Clayton Act. The same will be true of prosecutions under § 2(f)<sup>210</sup> of NCRA-venturers as buyers who knowingly receive the benefit of discriminations prohibited by § 2(a). NCRA will not hamper criminal prosecutions under § 3 of the Robinson-Patman Act<sup>211</sup> since it neither is one of the classic antitrust laws nor is character-

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201. 15 U.S.C. § 14 (1982).

202. 15 U.S.C. § 18 (1982).

203. 15 U.S.C. §§ 13(c)-(e) (1982).

204. 15 U.S.C. § 13(c) (1982).

205. 15 U.S.C. §§ 13(d) & (e) (1982).

206. 15 U.S.C. § 13(a) (1982). Note that the penal portion of the Robinson-Patman Act did not become part of the Clayton Act or otherwise come to constitute one of the antitrust laws. 15 U.S.C. § 13a (1982).

207. *Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835 (7th Cir. 1961).

208. *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948).

209. 15 U.S.C. § 13(f) (1982).

210. 15 U.S.C. § 13(a) (1982).

211. 15 U.S.C. § 14 (1982). The purpose of § 3 is to minimize anticompetitive foreclosure of outlets for commodities. Although money was held — long ago — not to constitute a commodity for purposes of a § 3 tying analysis, *United States v. Investors Diversified Serv. Co.*, 105 F. Supp. 645 (D. Minn. 1951), the Supreme Court later took pains to stress that money is a commodity in a Sherman Act tying context when the stress was unnecessary. *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 509 (1969) [hereinafter *Fortner I*].

ized as such for purposes of NCRA.

4. *Section 3 of the Clayton Act.*—Of greater import is § 3 of the Clayton Act. Tying is but one of four marketing practices addressed by § 3 of the Clayton Act. Assuming the requisite probability of injury to the competitive process, § 3 also condemns *marketer-imposed* requirements contracting, exclusive dealing, and granting of price concessions to secure benefitted customers' abstention from using or dealing in goods of the conceding seller's competitors.<sup>212</sup>

(a) *Potential circumscription of § 3 of the Clayton Act via NCRA § 3.*—Like § 2 of the Clayton Act, § 3 is not peculiarly pertinent to joint ventures. However, it is arguable that NCRA § 3 presents potential for circumscribing application of § 3 of the Clayton Act to marketing techniques used either by a venture defined at NCRA § 2(a)(6) or, in certain circumstances, parties to such a venture. This potential arises from not only NCRA's rule of reason but its encouragement *per* § 2(a)(6) to "granting of licenses for the results" produced by defined ventures linked to leave, set forth at NCRA § 2(b)(2), for venturers to indulge "conduct restricting, requiring or otherwise involving. . . production or marketing" so long as it is limited to enjoyment "of proprietary information developed through" the venture.

(b) *Effect of NCRA rule of reason on per se application of the Sherman Act.*—The potential for circumscribing § 3 of the Clayton Act via NCRA § 3 is not as dramatic as the effect of the NCRA rule of reason on Sherman Act tying jurisprudence. *Per se* stigmatization of tying, of course, is limited to § 1 of the Sherman Act. The stigmatization has a curious history. Proceeding under § 3 of the Clayton Act, prosecutors theoretically are required to demonstrate some fairly substantial probability of anticompetitive effect.<sup>213</sup> This contrasts sharply with the burden implicit in prosecuting *per se* offenses. Unlike Sherman Act violations, violations of § 3 of the Clayton Act do *not* expose transgressors to penal consequences. Alone among the four commercial practices addressed by § 3, tying has been stigmatized as also offensive *per se* to the Sherman Act. However, unlike the classic *per se* offenses but somewhat comparable to concerted refusals to deal,<sup>214</sup> both purpose and power are relevant to characterizing tying as offensive *per se* to § 1 of the Sherman Act.<sup>215</sup> Unlike § 3 of the Clayton Act, which condemns certain conduct of

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212. *Standard Fashion Co. v. Magrave-Houston Co.*, 258 U.S. 346 (1922).

213. See generally, L. SULLIVAN, *supra* note 72, at 229-65.

214. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984).

215. 15 U.S.C. § 14 (1982).

*sellers and lessors of commodities* for use or resale within the U.S.A.,<sup>216</sup> the Sherman Act can be deployed not only against buyers, lessees and licensees but also by reference to transactions in such as realty, services and intellectual property<sup>217</sup> without necessary reference to use or consumption in the U.S.A.

Dicta in *Times-Picayune Publishing Co. v. U.S.* taught that

[w]hen the seller enjoys a monopolistic position in the market for the 'tying' product, or if a substantial volume . . . in the 'tied' product is restrained, a tying agreement violates the narrower standards expressed in § 3 of the Clayton Act because from either factor the requisite potential lessening of competition is inferred. And because for even a lawful monopolist it is 'unreasonable' per se, to foreclose competitors from any substantial market, . . . tying . . . is banned by § 1 of the Sherman Act whenever *both* conditions are met.<sup>218</sup>

Enacting § 3 of the Clayton Act in 1914,<sup>219</sup> Congress saw fit to burden prosecutors with proving that "the effect of such lease, sale, or contract for sale of such [proscribed] condition . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce."<sup>220</sup> The point was to relieve prosecutors from the heavier burdens *then* demanded of prosecutions under § 1 of the Sherman Act as they might be aimed at tying, exclusive dealing or requirements contracting which then were thought of as tools suitable to would-be monopolists. Only *commodity* marketers were exposed to § 3 of the Clayton Act. Section 3 liberated prosecutions from *necessarily* entailing proof of marketers' anticompetitive purposes or their arrangements' inevitably anticompetitive effects. Obviously, Congress did not feel impelled either to subject commodities marketers' tying, exclusive dealing and full requirements contracting to *per se* characterizations or to ease prosecutors' burdens concerning such practices indulged by marketers of other than commodities or to ease prosecutors' burdens concerning such indulgences by demanding customers.

Yet, in the 1958 *Northern Pacific Ry. v. U.S.* decision, the Supreme Court not only held tying by a dominant merchant to be offensive *per se* to § 1 of the Sherman Act but so ordained in a context in which a dominant real estate operator tied its rail carriage ser-

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216. *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958) (dominance of realty used to tie patronage of rail carriage); *United States v. Loew's, Inc.*, 371 U.S. 38 (1962) (ties of copyrighted cinema productions).

217. 345 U.S. 594, 608-09 (1953).

218. 38 Stat. 731 (1914).

219. 15 U.S.C. § 14 (1982). *See also*, *Standard Fashion Co. v. Margrave-Hudson*, 258 U.S. 346 (1922).

220. 356 U.S. 1, 5 (1958).

vices. Writing for the majority, Justice Black not only repeated respected theorems that "it is not material that the prices fixed or the markets allocated were reasonable" but purported to relegate "business necessity" to obloquy.<sup>221</sup> Thereafter, mandatory block-booking of copyrighted cinema productions was condemned as tying offensive *per se* to § 1 on the dubious thesis that a copyright is the economic equivalent of a patent in terms of being a licit monopoly itself constituting a dominant market position.<sup>222</sup> Subsequently, devolution of *dominance* over the tying item of commerce proceeded from a "sufficient economic power to impose an appreciable restraint on free competition in the tied product"<sup>223</sup> to, in a case involving promotion of prefabricated housing by provision of below-market development loans, "some advantage not shared by [the tying merchant's] competitors in the market for the tying" item of commerce.<sup>224</sup> Thus, assuming that a "not inconsiderable amount of commerce" in the tied item of commerce is foreclosed from the tying marketer's competitors,<sup>225</sup> prosecution of tying under § 1 of the Sherman Act became almost as easy as prosecution of *commodity* ties under § 3 of the Clayton Act. Only recently has the Supreme Court indicated that a successful Sherman Act prosecution must include proof of a coercive effect on the customer subjected to the tie.<sup>226</sup> Such coercion is *not* necessarily part of the prosecutor's burden under § 3 of the Clayton Act.

It is conceivable that a joint venture defined at NCRA § 2(a)(6) may make its prototypical equipment or licenses of its technology available only on condition that the buyer, lessee and/or licensee accept a tie geared to not only the venture's enjoyment of the fruits of its R&D but also quality control (achievable, e.g., by use of a proprietary catalyst). It may be less conceivable — in a pragmatic context — that such a defined venture become a marketer of *commodities* on a scale compatible with use of the techniques conditionally condemned by § 3 of the Clayton Act. Yet, if the fruit of a joint R&D effort is a process for producing commonly recognized product *via* a more economic process, it well may be that testing product equivalency by reference to a generic standard or testing compatibility with customers' process machinery, or both, will demand exclusive long-term supply contracts. Assuming that a defined ven-

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221. *United States v. Loew's, Inc.*, 371 U.S. 38 (1962).

222. *See supra* note 221 at 6.

223. *U.S. Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 620 (1977) [hereinafter *Fortner II*].

224. *International Salt Co. v. United States*, 332 U.S. 392 (1947); *see also*, *Fortner I*; *see supra* note 212.

225. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984).

226. 83 CONG. REC. 546 (1938), *reprinted in* C. DUNN, *WHEELER-LEA ACT, A STATEMENT OF ITS LEGISLATIVE RECORD* 201 (1938) [hereinafter cited as C. DUNN].



ture has produced a patented or unpatented proprietary process for mass production of a commodity, it is equally conceivable that validation of process safety, process economics or product safety would seem — to reasonable businesspersons — to dictate ties, appointments of exclusive dealers, and total requirements contracting or a combination of them. Should any one or more of these business reasons prove to be pertinent, NCRA § 3 should supplant not only threat of a *per se* application of the Sherman Act but also the probable injury test of Clayton § 3.

#### *D. Federal Trade Commission Act (FTCA) Implications*

Irony attends consideration of NCRA's impact (or the lack thereof) on FTCA. Endorsing the bill that ultimately became FTCA, President Wilson observed that

Nothing hampers business like uncertainty, nothing daunts or discourages it like the necessity to take chances, to run the risk of falling under condemnation of the law before it can make sure just what the law is.<sup>227</sup>

This sentiment is not unlike those underlying the enactment of NCRA and, in 1982, ETCA.

As enacted in 1914, FTCA's principal thrust was at "unfair methods of competition".<sup>228</sup> NCRA's definition of "antitrust laws"<sup>229</sup> comprehends exactly that thrust of FTCA. However, the Wheeler-Lea amendments of 1938 engrafted "unfair or deceptive acts or practices" onto FTCA § 5's address to "unfair methods of competition".<sup>230</sup> By definition, NCRA does *not* include FTCA's concern with "unfair . . . acts or practices" among the antitrust laws conditionally subordinated to NCRA's rule of reason. The NCRA legislative history fails to expand on the rationale for distinguishing between FTCA's disjunctive addresses to "unfair methods of competition" and "unfair . . . acts or practices". NCRA's definition of "antitrust laws" is one of the few features of the Reagan Administration's proposed *National Productivity & Innovation Act of 1983* that was unmodified in the ultimate 1984 enactment.<sup>231</sup>

That FTC jurisdiction to condemn "unfair . . . acts or practices" is significant to virtually all exclusionary commercial undertakings cannot be gainsaid since the Supreme Court's 1966 *Brown Shoe II* and 1972 *S&H* decisions. The former commissioned FTC to

227. 38 Stat. 719 (1914).

228. 15 U.S.C. § 4301(a)(1) (1984).

229. 52 Stat. 111 (1938). See generally, D. Unkovic, J. Maher & N. LaMont, *International Opportunities and the Export Trading Company Act of 1982*, A-31-34 (BNA 1934).

230. H.R. 3878, 98th Cong., 1st Sess. § 20(2) (1983).

231. See *Brown Shoe II*, *supra* note 192, at 321-22.

condemn conflict with "the basic principles of the Sherman and Clayton Acts even though such practices may not actually violate" such statutes.<sup>232</sup> *S&H* held that FTC's prosecutorial and judicial roles are triggered by "public values beyond simply those enshrined in the letter or in the spirit of the antitrust laws."<sup>233</sup> Happily, violation of FTCA § 5(a)(1) does not expose the alleged transgressor to private suitors. Prosecutions for engagement in "unfair methods of competition" entail proof of "at least a tendency to injure respondent's competitors."<sup>234</sup> One of the purposes of the Wheeler-Lea amendment to FTCA § 5(a)(1) was to remove this need for evidence of the potential for injury to competitors of the respondent.<sup>235</sup> *Brown Shoe II* and *S&H* speak to judicial respect for this purpose. The decisions defer to FTC expertise and demand nothing remotely reminiscent of rule of reason analysis.

Although NCRA's legislative history is less than helpful to understanding why Congress chose to permit FTC to exert its "unfair . . . acts or practices" jurisdiction over not only joint ventures defined at NRCA § 2(a)(b) but also their activities, a key may be provided by the legislative history for ETCA. The legislative history betrays misconceptions that only FTC's "consumer protection" jurisdiction is summed up by "unfair deceptive acts or practices" whereas the Commission's antitrust jurisdiction is implicit in "unfair methods of competition".<sup>236</sup> Long before the Wheeler-Lea amendments, consumer protection played a significant role in elaboration of "unfair methods of competition".<sup>237</sup> The Wheeler-Lea amendments to FTCA § 5(a)(1) did *not* spring solely from a need to add consumer protection to antitrust. *S&H* and *Brown Shoe II* were *not* "consumer protection" cases. Nevertheless, amendment of FTCA § 5(a) by ETCA Title IV burdened only prosecution of "unfair methods of competition" cases<sup>238</sup> and the COR made available under ETCA Title III does not shield against FTC attacks on "unfair . . . acts or practices."<sup>239</sup> Purely and simply, it seems that a conceptual error implicit in ETCA has been brought forward — unthinkingly — into NCRA's definition of the "antitrust laws" it affects. This NCRA

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232. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972).

233. *FTC v. Raladam Co.*, 283 U.S. 643, 647-49 (1931) [hereinafter *Raladam I*].

234. 80 CONG. REC. 6588 (1936), reprinted in C. DUNN, *supra* note 226, at 77. Note that, when conditionally providing for exemption of joint R&D by small businesses from antitrust laws and FTCA § 5(a)(1), Congress did not see fit to discriminate between "unfair methods of competition" and "unfair or deceptive acts or practices." 15 U.S.C. § 638(d)(3) (1982).

235. H.R. REP. NO. 686, 97th Cong., 2d Sess. 8, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 2493.

236. See *Raladam I*, *supra* note 233.

237. 15 U.S.C. § 45(a)(3) (1982).

238. 15 U.S.C. § 4021(6) (1982).

239. F.T.C. has authority to promulgate "trade regulation rules" by reference to its jurisdiction over "unfair. . . acts or practices" 15 U.S.C. § 57a(a)(1)(B) (1982).

anomaly is not confined to FTC jurisdiction but, as developed later, also impacts at the state level.

Matter not how FTC jurisdiction over "unfair . . . acts and practices" came to elude NCRA's net, it did so. Thus, the NCRA rule of reason will not burden FTC *if* the political context changes sufficiently to encourage Commission prosecutions under or elaborating *Brown Shoe II* and *S&H*. The authors submit that this is not only unfortunate but, most probably, the product of insufficient research on the part of those who sought to free defined R&D ventures' activities from analyses (and condemnations) pursuant to any standard other than the NCRA rule of reason. Failure to immunize ventures defined at NCRA § 2(a)(6) from FTC "unfair . . . acts or practices" jurisdiction presents, of course, a trap for those who ignore the likelihood that a now politically-constrained FTC is only a sleeping giant in terms of not only prosecutorial but rule-making<sup>240</sup> potencies. More than that, the failure sets another trap for those who might think NCRA addresses all state statutory unfair competition rules!

### E. State Implications

While many federal antitrust statutes and much of FTC's jurisdiction reach conduct only *affecting* interstate or foreign commerce, there is no *generalized* preemption of state ability to adopt and enforce antitrust, unfair trade and comparable statutes. States' police powers include ability to regulate intrastate commerce. The Supreme Court respects state antitrust jurisdiction over local manifestations of interstate commerce.<sup>241</sup>

Many states have antitrust statutes replicating basic themes of the Sherman Act.<sup>242</sup> Some states have constitutional provisions concerning monopolization.<sup>243</sup> Many states, without necessary reference to whether they have antitrust laws, have unfair trade practice statutes (a/k/a "little FTC Acts")<sup>244</sup> which tend to be far more particularized than FTCA § 5(a)(1). Several states have "unfair sales acts" or similar statutes dealing with price discrimination or sales below cost.<sup>245</sup>

The nature of this article is such that it is impractical to remark

240. *Standard Oil of Ky. v. Tenn.*, 217 U.S. 413, 422 (1910).

241. Compilation of state antitrust statutes, 4 Trade Reg. Rep. (CCH) §§ 30,000-35,530.10.

242. See, e.g., ALA. CONST. art. IV, § 103; ARIZ. CONST. art. 14, § 15; WYO. CONST. art. 1, § 30 and art. 10, § 8.

243. See *supra* note 235. See also R. FELLMOTH & T. PAPAGEORGE, A TREATISE ON STATE ANTITRUST LAW AND ENFORCEMENT, [July-Dec.] 892 Antitrust & Trade Reg. Rep. (BNA) Supp. no. 1, at 20 (Dec. 7, 1978).

244. *Id.*

245. 15 U.S.C. §§ 4016(a) & 4021(b) (1982).

state statutes and precedents at length. Yet, it must be acknowledged that enforcement of state antitrust schemes by public authorities — subject to notable, but few, exceptions — is not consistently vigorous. Various state statutes seek to encourage private enforcement by provision of treble damages. Earlier, it was noted that state competition laws have not been subjected to *general* preemption. ETCA presents a species of *particularized* preemption. Title III of ETCA contemplates that conduct described in a COR is shielded against public or private enforcement of “any state antitrust or unfair competition law”.<sup>246</sup> NCRA presents another species of *particularized* preemption but its address to state law differs from ETCA.

ETCA Title III includes pertinent state laws within its definition of antitrust laws,<sup>247</sup> NCRA does not do so.<sup>248</sup> Rather, NCRA § 3 subjects “any state law *similar to the antitrust laws*” defined in NCRA to its rule of reason<sup>249</sup> and, to the extent a defined venture has availed itself of the notification procedure contemplated by NCRA §6,<sup>250</sup> NCRA § 4(c) limits recoveries under “any *state law providing damages for conduct similar to that forbidden by the antitrust laws*” to actual damages.<sup>251</sup> Some nice (and, some might argue, not-so-nice) distinctions are presented by NCRA’s address to the states.

NCRA’s definition of “antitrust laws” calculatedly avoids embrace of FTCA’s address to “unfair or deceptive acts or practices”. Therefore, state unfair trade practice statutes (to the extent they avoid adoption of the “unfair methods of competition” legend) are *not* similar to the “antitrust laws” defined in NCRA. Consequently, standards guiding application of such state statutes are not preempted by NCRA’s rule of reason and, to the degree states afford (or permit) greater than actual damages to those injured by conduct violating state unfair trade practices acts, the limitation explicit in NCRA § 4(c) is inapplicable. Whether these consequences were intended by legislative and other sponsors of NCRA is not disclosed by the legislative history. Such a purpose is unlikely. As noted earlier,<sup>252</sup> NCRA’s definition of “antitrust laws” is one of the few features of the Administration’s 1983 proposal that survived as NCRA was enacted. The authors suspect that the failures to preempt were unanticipated, relating more to slovenly failure to consider what was in-

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246. 15 U.S.C. § 4021(b) (1982).

247. 15 U.S.C. § 4301 (1984).

248. See *supra* text accompanying note 44.

249. 15 U.S.C. § 4305 (1984).

250. 15 U.S.C. § 4303 (1984).

251. See *supra* text accompanying note 230.

252. Note that other exemptive schemes have not discriminated between the major disjunctives of FTCA § 5(a)(1). See Defense Production Act, 50 U.S.C. § 2158(b) (1982), and Small Business Act, 15 U.S.C. § 638(d)(3) (1982).

volved in ETCA's inclusion of only part of FTCA § 5(a)(1) when the ETCA definition of federal "antitrust laws" was lifted for use in what became NCRA.<sup>253</sup>

There is a possibility that NCRA's failures to preempt have significances beyond state unfair trade practices statutes. Thus, surviving state "unfair sales acts" tend to have more in common with § 3 of the Robinson-Patman Act (which criminalized certain price discriminations)<sup>254</sup> than they do with § 2(a) of the Clayton Act.<sup>255</sup> Section 3 of the Robinson-Patman Act is *not* one of the "antitrust laws"<sup>256</sup> as that term is defined by NCRA. Since state unfair sales acts are of relatively little consequence in this day and age, they are not developed herein save to note that it is quite arguable that they are not "similar to . . . antitrust laws" addressed by either NCRA's rule of reason or its limitation of liability.

In any event, those who organize a venture defined at NCRA § 2(a)(6) must consider potencies for its operations of not only FTC rule-making and prosecutions concerning "unfair . . . acts or practices" but also at least state unfair trade practices statutes.

#### IV. NCRA Limitation of Liability

NCRA's three so-called "detrebling" provisions<sup>257</sup> require more of a joint R&D venture than does the NCRA rule of reason. They provide, however, considerably more than detrebling. Whereas existence and activities of *all* joint ventures within NCRA § 2(a)(6) and the qualifications to NCRA § 2(b) are entitled to analysis under NCRA § 3, there is a social price attendant upon their achievement of limitation of liability under NCRA § 4 in that affirmative acts are exacted from *qualified* venturers desiring its protection. Notifications conforming to standards in NCRA § 6 must be filed with DOJ and FTC.<sup>258</sup>

Use of "qualified" signifies that limitation is not available to a defendant *if* the challenged conduct is violative of a "decree or order, entered after [October 11, 1984], in any case or proceeding under" NCRA-defined federal antitrust laws or state analogues "challenging such conduct as part of a joint research and development venture."<sup>259</sup> Note use of the indefinite article. Under NCRA § 4(e), disqualification from detrebling can occur although the prior decree does not read on conduct intrinsic to *the* joint venture conduct

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253. 15 U.S.C. § 13a (1982).

254. *Id.*

255. *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958).

256. 15 U.S.C. § 4303 (1984).

257. 15 U.S.C. §§ 4303 & 4305(a) (1984).

258. 15 U.S.C. § 4303(e) (1984) (emphasis supplied).

259. 15 U.S.C. § 4014(a)(2) (1984).

latterly challenged.

If one assumes an official disposition carefully to monitor activities of ventures defined at NCRA § 2(a)(6), *which the authors do not*, the point of this provision seems to be to allow every venture at least one bite. The authors say "at least" since this disqualification from NCRA § 4 safe harbors keys on existence of a "decree or order" vice a judgment. Continuing to indulge the assumption of official care *arguendo*, NCRA could be characterized as more rigorous than ETCA Title III since a COR is not necessarily prejudiced by losing any lawsuit other than a formal revocation.<sup>260</sup> On the other hand, under NCRA, only limitation of liability is prejudiced by a prior *decree*. Applicability of the NCRA rule of reason is unabated by a prior decree.

#### A. *Invasion of State Sovereignty*

Putting the preceding minor attainer aside, the three limitation provisions seem, at a glance, to be fairly straightforward. They are not. Impingement on state remedies proceeds well beyond detrebling. Two of the three focus on claims asserted by persons<sup>261</sup> and states<sup>262</sup> under §§ 4 and 4c of the Clayton Act.<sup>263</sup> The third looks to persons proceeding under state laws "providing damages for conduct similar to that forbidden by the [NCRA-defined] antitrust laws".<sup>264</sup> While NCRA §§ 4(a) & (b) are true to "detrebling" usages attending passage of NCRA (as they hold private parties and states proceeding under §§ 4 and 4c of the Clayton Act to actual vice treble damages), NCRA § 4(c) goes much further. It provides that a successful plaintiff under a pertinent state law "shall not recover in excess of the actual damages sustained."<sup>265</sup> This preempts state laws not only to the extent they afford treble damages but also to the degree they present a potency for recovery of punitive damage awards within states' continuing evolution of discrete approaches to tort litigation.

Consequently, there has been a substantial invasion of states' otherwise sovereign powers not only to legislate unfair competition rules and remedies but to permit their courts of general and original jurisdiction to evolve forms of relief appropriate to the torts before them. The authors are not disposed to expatiate on either punitive

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260. 15 U.S.C. § 4303(a) (1984).

261. 15 U.S.C. § 4303(b) (1984).

262. 15 U.S.C. §§ 15 & 15c (1982).

263. 15 U.S.C. § 4303(c) (1984).

264. *Id.*

265. See, e.g., H.R. CONF. REP. NO. 98-1044, 98th Cong., 2d Sess. 13, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3137 in which the "Conferees . . . emphasize that the elimination of treble damages for agreements limited to joint research and development for which notification has been provided is not to be regarded as a precedent for any further elimination of treble damages."

damages as available in state courts or appropriateness of federal preclusion of punitive damages to acquit state policies. Proceeding from committee reports,<sup>266</sup> they infer that responsible legislators were innocent of any intent to invade states' rights so deeply. However, the authors cannot resist confessing a certain wry amusement concerning the speed with which NCRA's preemption of state-afforded punitive damages whisked through a Congress unable to come to grips with years of agitation for federal enunciation of a uniform products liability regime limiting *inter alia* availability of punitive damages in the sense of avoiding only redundancy of such awards.

*B. The NCRA Disclosure Regime: The Price of Limited Liability*

As noted, there is a price for limitation of liability under NCRA § 4. The price is a new and curious manifestation of the disclosure culture that should enchant fans of Joseph Heller and George Orwell. The § 4 shields are prospective. They limit damages for injurious conduct indulged — *after* effectiveness under NCRA § 6(a) of an initial "notification" and appropriate supplements thereto processed on behalf of a defined venture — but only to the degree such conduct "is within the scope of" the notification.<sup>267</sup> Consequently, attention to NCRA § 6 is demanded. Potential plaintiffs will not be charmed.

Venturers are not required to comply with NCRA's disclosure regime.<sup>268</sup> Rather, those who would enjoy the benefits of prospective damage control under NCRA § 4 are obliged to honor NCRA § 6 as the price of § 4's relatively safe harbors.<sup>269</sup> There is an unspoken analogy to the process whereby patent monopolies are the reward for disclosures of inventions. The analogy goes further. Just as those who maintain trade secrets may prosper or suffer outside of the patent system, joint R&D venturers are the best judges of whether they will need the shields of NCRA § 4 and whether the essentially self-targeting disclosure price is worth the protection to be achieved. In this connection, it deserves restatement that applicability to venturers defined at NCRA § 2(a)(6) of the NCRA § 3 rule of reason is *not* contingent upon submitting to the NCRA § 6 disclosure regime. The notification process relates only to limitation of damages.

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266. 15 U.S.C. §§ 4303(a)(1), (b)(1) & (c)(1) (1984).

267. 15 U.S.C. § 4305(a) (1984).

268. 15 U.S.C. § 4303 (1984).

269. See *supra* note 267.

1. *Scope of Disclosure.*—The point of the NCRA § 6 disclosure regime is to provide early warnings of sorts to DOJ and FTC<sup>270</sup> as well as, through notices in the *Federal Register* that describe “in general terms the area of planned activity of” comprehended ventures,<sup>271</sup> advices of lesser quality to venturers’ competitors and others likely to be affected by conduct of filing ventures. However, it is to the scope of the notification filed with DOJ and FTC that the § 4 shields are addressed<sup>272</sup> rather than to the scope of the *Federal Register* notice. This presents problems for not only venturers desiring NCRA §4 safe harbors but also, and far more significantly, for both those excluded from but potentially prejudiced by a given venture and those otherwise subject to its impositions. The patent analogy breaks down very rapidly when one considers the quality of data potentially available *and unavailable* to those outside the annointed circle of a defined venture.

When they opt to file a notification, venturers must make a second “judgment play” of sorts concerning organization and content of the “notification”. Warning that the § 4 protections are “based on the contents of” notifications, DOJ and FTC have chosen to avoid the role of SEC reviewers of registration statements but to accept the rule of notice editors.<sup>273</sup> This is consistent with Congressional recognition that notifications need not be all that informative.

A joint R&D venture need not specifically notify [DOJ] and . . . FTC that it intends to engage in the activities described in Section 2(a)(6) of the bill, provided that the venture supplies [DOJ] and . . . FTC with the notification described in section 6(a). Thus, *unless a venture has notified* [DOJ] and . . . FTC *to the contrary*, any activity within the definitions of section 2(a)(6) is within the scope of any venture as to which notification has been filed under Section 6(a). For example, unless the venture has indicated otherwise, efforts to market the results of the venture, such as through licensing, will automatically be considered within the scope of a properly notified joint R&D venture.<sup>274</sup>

However, NCRA § 6(a) is not so cavalier. It requires that a notification disclose “the nature and objectives of the venture” as well as identities of “parties to the venture”.<sup>275</sup> Thus, venture planners seem

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270. 15 U.S.C. § 4305(b) (1984).

271. See *supra* note 266.

272. See U.S. Dept. of Justice statement of Dec. 11, 1984, *reprinted in* Trade Reg. Rep. (CCH) ¶ 4513 in context of NCRA § 6(b) (15 U.S.C. § 4305(b) (1984)).

273. H.R. CONF. REP. NO. 1044, 98th Cong., 2d Sess. 12, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3137.

274. 15 U.S.C. § 4305(a)(1) & (2) (1984).

275. 15 U.S.C. § 4305 (1984).



to be faced with a problem not unlike that confronting draughtspersons of corporate charters in jurisdictions lacking provision for an abbreviated claim to all purposes and powers permitted by the law of the incorporating jurisdiction. Will a judicial strict constructionist be content with a notification that say only "the parties to this venture intend jointly to undertake and conduct all of the activities particularized at section 2(a)(6) of the National Cooperative Research Act of 1984, 15 U.S.C. § 4301(a)(6)" that the court will consider "the nature and objectives of such venture" to have been communicated?

Those to be left in external darkness must recognize that it is inevitable that one presenting a notification "on [the] venture's behalf"<sup>276</sup> will draft the notice<sup>277</sup> despite a statutory hint to the contrary and that "general terms"<sup>278</sup> published in the notice will not be overly informative. The notification may not be much more informative unless the venturers wish to take advantage of the NCRA § 2(b) qualifications or otherwise to guard against a judge who reads NCRA § 6(a) rather than its legislative history. DOJ seems willing to honor the history rather than to construe § 6(a) at all expansively.<sup>279</sup> Even were this not so, there is yet another rub for non-governmental outsiders.

2. *Arrival in NCRA §4 Safe Harbors.*—Assuming effectiveness of a "notification", the NCRA § 4 safe harbors are limited to conduct within the scope of the notification.<sup>280</sup> However, plaintiff has no right to examine the notification before commencing litigation<sup>281</sup> and, even when it has commenced, discovery of federal resources is limited!<sup>282</sup> NCRA § 6(d) provides against DOJ or FTC release of any part of a filed notification *except* "the information published in" the Federal Register.<sup>283</sup> So much for the patent analogy. While the venturers can decide whether or not to file a notification, they may not have to be all that concerned with disclosure to the public. The same is true of data developed by DOJ or FTC "in the course of any investigation, administrative proceeding, or case, with respect to a potential violation of the antitrust laws by" the venture concerning which notification was filed.<sup>284</sup> Catch 22 seems too modest an accolade for this ingenious deterrance to plaintiff's indulging complete cost-benefit analyses *before* commencing treble-damage actions.

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276. See *supra* note 266.

277. 15 U.S.C. § 4305(b) (1984).

278. See *supra* note 266.

279. See *supra* note 260.

280. 15 U.S.C. 4305(d) (1984).

281. *Id.*

282. *Id.*

283. *Id.*

284. 15 U.S.C. § 4305(a) (1984).

(a) *Membership changes and additional notification.*—Earlier, submission to the notification regime was referred to as the price of a defined venture's achievement of limitation of liability. While the regime commences with a filing "no later than 90 days after entering into a written agreement to form" the venture, the regime is not exhausted by the initial filing. Within ninety days after a "change in its membership," a venture must notify DOJ and FTC of the change. Parties to the venture are encouraged to file such additional notifications as the parties deem appropriate "to extend the protections of" § 4.<sup>285</sup>

(b) *Post-filing factors.*—Mere filing of an appropriate notification does not signal safe arrival in the NCRA § 4 safe harbors. According to NCRA § 6(b), either DOJ or FTC is to publish the Federal Register notice "not later than 30 days after receiving a notification." *Per* administrative agreement, DOJ is the publisher.<sup>286</sup> *Per* the statute, a notification will be effective "to convey the protections of section 4 as of the earlier of" publication date or expiration of thirty (30) days from the authorities' receipt of the notification.<sup>287</sup> DOJ and FTC solicit submission of a "draft Federal Register notice" by the party filing the notification as well as "evidence" that the filing party or "other persons" are authorized to review the (presumably redrafted) notice before publication.<sup>288</sup>

(c) *Recommendations regarding disclosures.*—It is the authors' thought that venture planners should not be encouraged by the legislative history<sup>289</sup> to indulge crypticisms and DOJ's receptivity to venturers' exercising

their own discretion in determining the quantity and form of the material required to describe the nature and objectives of their venture.<sup>290</sup>

Rather, mindful of the potency of review by trial judges, the authors suggest that notifications and modifications thereto should be drawn in such manner as to inform a semi-sophisticated reader of not only liberally-stated commercial parameters of the undertaking (advantages to be taken of the NCRA § 2(b) qualifications) but aspects of the contemplated operation that might be offensive to normal anti-trust norms (e.g., interlocking boards of an incorporated joint venture vehicle and incorporated venturers). The phrase "semi-sophisticated" is used to denote the authors' conviction that Congress did

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285. See *supra* note 272.

286. 15 U.S.C. § 4305(b) (1984).

287. See *supra* note 272.

288. See *supra* text accompanying note 273.

289. See *supra* note 272.

290. In re Universal Camera Corp., 19 S.E.C. 648 (1945).

not evoke a standard akin to the "average investor" supposedly addressed in prospectuses qualified under the federal Securities Act of 1933.<sup>291</sup> Notifications under NCRA are not aimed at the public or any segment of it. The official addressees, DOJ and FTC, must be presumed to possess a certain legal and economic sophistication beyond the average investor. Trial judges, later to be called upon to determine the "scope" of notifications, must be presumed to possess the legal sophistication of the average lawyer.

NCRA affords DOJ and FTC power only to determine the "general contents" of the Federal Register notice.<sup>292</sup> Further, adequacy of the *notice* is *not* germane to effectiveness of the notification and achievement of the NCRA § 4 safe harbors. Whether the agencies will strain to develop an "average competitor" standard for the notices is doubtful. Publications through 1987 do not remove the doubt. On a *theoretical* basis, DOJ and FTC are helpless to resist effectiveness of a notification that informs them that an NCRA § 2(a)(b) venture will embark on missions or use techniques the authorities would prefer not to see. "Theoretical" is stressed since, unlike an ETCA Title III COR,<sup>293</sup> NCRA does not constrain DOJ ability to use its investigative powers and, like ETCA, NCRA fails to constrain FTC powers either to investigate or to promulgate rules as to "unfair . . . acts or practices" or to prosecute such acts or practices. Of course, prosecution of NCRA rule of reason theories against ventures defined at NCRA § 2(a)(6) is permitted. Thus, while there is a temptation to regard DOJ and FTC as paper tigers when confronted with a plainly anticompetitive NCRA §6 notification, the temptation should be resisted. Looking only to their investigative powers, the agencies continue to have weapons to harass and thereby to magnify venturers' overhead. Looking beyond agency investigatory powers, DOJ and FTC can prosecute. Even were this not so, the prudent planner will not provide incentive for a judge trying a damage action to discover that a species of conduct is beyond the *disclosed* scope of the venture.

(d) *Types of ventures seeking NCRA § 4 protections.*—A reading of notifications published in the Federal Register reveals the types of ventures availing themselves of the protections under NCRA § 4. Many entities appear to be organized as partnerships or unincorporated associations<sup>294</sup> although there are entities formed as

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291. 15 U.S.C. § 4305(b) (1984).

292. 15 U.S.C. § 4013(a)(3) (1982).

293. In the first three years under the Act, only 13 ventures filing under the Act were specifically listed as operating as an incorporated joint venture.

294. Examples of ventures incorporated as nonprofit corporations are Portland Cement Association, 50 Fed. Reg. 5,015 (1985); Semiconductor Research Corp., 50 Fed. Reg. 4,281 (1985); Engine Manufacturers Association, 51 Fed. Reg. 25,956 (1986); and National Center

both profit and nonprofit<sup>295</sup> corporations as well as limited partnerships.<sup>296</sup> As noted earlier,<sup>297</sup> participants in many of the ventures seeking the protections of the Act are foreign as opposed to domestic companies. Other participants are foreign-owned or have significant foreign ownership. Traditional industries such as automobiles,<sup>298</sup> steel,<sup>299</sup> cement,<sup>300</sup> glass,<sup>301</sup> movies<sup>302</sup> and pharmaceuticals<sup>303</sup> are represented as are high technology areas such as computers,<sup>304</sup> semiconductors,<sup>305</sup> and genetic engineering.<sup>306</sup> Some ventures have filed at the point of entering into organizational discussions<sup>307</sup> while others seem to file only after agreement on long range<sup>308</sup> or short term projects.<sup>309</sup> One trade association seems to file a separate notice for each project undertaken although venture participants remain constant.<sup>310</sup> Of parenthetical interest are filings by governmental agencies.<sup>311</sup>

Congress often effects a trade-off of sorts when it enunciates a

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for Manufacturing Sciences, 52 Fed. Reg. 8,375 (1987).

295. Examples of ventures formed as limited partnerships are Agrigenetics Corp., 50 Fed. Reg. 5,443 (1985) and Oncogen Limited Partnership, 50 Fed. Reg. 18,326 (1985).

296. See *supra* note 5.

297. See Motor Vehicle Manufacturers Association of the United States, 50 Fed. Reg. 5,444-5,450 (1985); Medium Range Truck Transmission Cooperative Project, 50 Fed. Reg. 4,928 (1985); Engine Manufacturers Association, 51 Fed. Reg. 25,956 (1986); Southwest Research Institute, 51 Fed. Reg. 5,813 (1986); Wickes Manufacturing Company, 51 Fed. Reg. 25,620 (1986); Metal Casting Technology, Inc., 52 Fed. Reg. 10,420 (1987).

298. See Bethlehem Steel Co. and United States Steel Corp., 50 Fed. Reg. 4,281 (1985); Joint Venture to Conduct Research on the Continuous Casting of Sheet Steel, 51 Fed. Reg. 21,426 (1986).

299. See Portland Cement Association, 50 Fed. Reg. 5,015 (1985).

300. See International Partners in Glass Research, 50 Fed. Reg. 14,175 (1985); Industry-University Center for Glass Research, 51 Fed. Reg. 32,262 (1986); Corning Glass Works, 52 Fed. Reg. 26,580 (1987).

301. See CPW Technology, 52 Fed. Reg. 22,692 (1987).

302. See Merrell Dow Pharmaceuticals, Inc. and Hoffmann-LaRoche Inc. Joint Venture, 50 Fed. Reg. 7,006 (1985).

303. See Computer Aided Manufacturing-International, 50 Fed. Reg. 3,425 (1985); Microelectronics and Computer Technology, 50 Fed. Reg. 2,633 (1985); Applied Information Technologies Corp., 50 Fed. Reg. 41,232 (1985); Intel Corporation/Xicor Corporation, 50 Fed. Reg. 50,864 (1985); Industry/University Cooperative Research Center for Software Engineering, 52 Fed. Reg. 4,065 (1987).

304. See Semiconductor Research Corp., 50 Fed. Reg. 4,281 (1985).

305. See Agrigenetics Corp., 50 Fed. Reg. 5,443 (1985).

306. See Software Productivity Consortium, 50 Fed. Reg. 2,633 (1985); Smart House Project, 50 Fed. Reg. 41,428 (1985); National Center for Manufacturing Sciences, 52 Fed. Reg. 8,375 (1987); National Forest Products Association, 52 Fed. Reg. 41,786 (1987).

307. See Microelectronics and Computer Technology Corp., 50 Fed. Reg. 2,633 (1985); Empire State Electric Research Corp., 50 Fed. Reg. 5,443 (1985); Applied Information Technologies Corp., 50 Fed. Reg. 41,232 (1985).

308. See Medium Range Truck Transmission Cooperative Project, 50 Fed. Reg. 4,928 (1985) [to end by 12/31/86]; Exxon Production Research Co. and Halliburton Services, 50 Fed. Reg. 2,632 (1985) [to end 12/31/85].

309. See Motor Vehicle Manufacturers Association of the United States, 50 Fed. Reg. 5,444-5,450 (1985).

310. See Adirondack Lakes Survey Corp., 50 Fed. Reg. 5,443 (1985); Empire State Electric Energy Research Corp., 50 Fed. Reg. 5,443 (1985); Computer Aided Manufacturing-International, 50 Fed. Reg. 3,425 (1985).

311. 15 U.S.C. § 4016(b)(1) (1982).

new policy. Thus, persons denied usual antitrust remedies by a COR issued under ETCA *may* come to enjoy a specialized remedy afforded by its Title III.<sup>312</sup> NCRA presents such a trade-off although it makes the limited ETCA Title III cause of action seem very generous. NCRA § 4(d) provides that successful plaintiffs limited to actual damages by the section "shall be awarded" interest on their damages "from the earliest date for which injury can be established" until judgment date. Even this palliative is qualified. A court can eliminate or modify an interest award if it finds that exaction of full interest "is unjust in the circumstances."<sup>313</sup>

## V. NCRA & Attorney's Fees

Like ETCA,<sup>314</sup> NCRA threatens losing private plaintiffs with liability for defendants' attorney's fees. This threat, however, is not as significant as it is in ETCA. NCRA § 5(a)(2) *directs* the court to favor "a substantially prevailing" defendant with an award of "the cost of suit . . . , including a reasonable attorney's fee, *if* the claim or . . . claimant's conduct during [its] litigation . . . was frivolous, unreasonable, without foundation, or in bad faith."<sup>315</sup> NCRA § 5(a)(1) contemplates a similar award to a "substantially prevailing" plaintiff.<sup>316</sup> Both awards are subject to being offset to the extent that the court *finds* the prevailing party burdened the litigation frivolously, unreasonably, without foundation, or in bad faith.<sup>317</sup> The process of awarding costs to successful defendants is *not* linked to existence or adequacy of a notification under NCRA § 6.

The Clayton Act contemplates award of attorney's fees only to prevailing plaintiffs.<sup>318</sup> ETCA anticipated NCRA in its concern for defendants but explicitly limited plaintiffs' exposure to situations in which there is a *finding* that defendants did not violate standards enunciated in ETCA.<sup>319</sup> That NCRA is not so limited is obvious. Yet, if one ignores the "Catch 22" implicit in compelling suit to discover the context of a notification,<sup>320</sup> NCRA does not indicate dedication to punishing zealous "private attorneys-general." The ultimate Conference Committee report makes much<sup>321</sup> of reliance upon

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312. 15 U.S.C. § 4303 (1984).

313. 15 U.S.C. § 4016(b)(4) (1982).

314. 15 U.S.C. § 4304(a)(2) (1984).

315. 15 U.S.C. § 4304(a)(1) (1984).

316. 15 U.S.C. § 4304(b) (1984).

317. 15 U.S.C. § 15(a) (1982).

318. 15 U.S.C. § 4016(b)(4) (1982).

319. See *supra* text accompanying notes 280-282.

320. H.R. CONF. REP. NO. 1044, 98th Cong., 2d Sess. 15, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3139-40.

321. 434 U.S. 412 (1978).

*Christiansburg Garment Co. v. EEOC*,<sup>322</sup> a "Title VII" case which validated awards of fees when plaintiff's claim was "frivolous, unreasonable or without foundation".<sup>323</sup> More than that, the Conferees stressed sympathy with later holdings of lower courts to the effect a plaintiff is liable for defendant's costs including fees when plaintiff continues to litigate *after* groundlessness of the essential claim becomes obvious.

## VI. Organizing & Maintaining R&D Ventures

Prior to recommending approaches to organizing and thereafter maintaining a venture qualified for maximum use of NCRA safe harbors, certain elemental questions must be addressed.

What of activities undertaken by a venture, otherwise conforming to the definition in NCRA § 2(a)(6),<sup>324</sup> that are beyond those mentioned in the section? What of agreements between or among venturers that are excluded by NCRA § 2(b) from the term "joint research and development venture"?<sup>325</sup>

It is easy enough to say that such conduct is not entitled to judicial application of the NCRA rule of reason. Very simply, NCRA § 3 keys on conduct indulged "in or performing a contract to carry out" an NCRA-defined venture and such a venture is recognized by reference to *activities* permitted it.<sup>326</sup> But such a response ignores very real questions.

Does an otherwise conforming venture lose its character as one defined by NCRA § 2(a)(6) when it engages in *activities* beyond the scope of NCRA § 2(a)(6)? Will the answer vary by reference to whether the *ultra vires* activity is anticompetitive? Whether or not indulgence in *ultra vires* activities disqualifies venturers from NCRA § 2(a)(6), thereby debarring them from the NCRA §§ 3 and 4 safe harbors, what is the effect of venturers' side agreements running afoul of the exclusions spelled out by NCRA § 2(b)? What if there are ten parties to a venture conforming to NCRA § 2(a)(6) and two of them have a side agreement, unknown to the other eight, excluded by NCRA § 2(b)? Is the joint venture so tainted as to be denied the safe harbors of NCRA §§ 3 and 4?

Once again, the starting point is the statute.<sup>327</sup> NCRA § 2(a)(6) equates the contemplated "venture" with "activities" undertaken for enumerated purposes. There is no limitation against engagement in activities beyond those coincident with purposes save as

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322. *Id.* at 417.

323. *See supra* text accompanying note 29.

324. *Id.*

325. *See supra* text accompanying notes 29-32.

326. *See supra* note 28.

327. *See supra* text accompanying note 29.

presented by NCRA §2(b).<sup>328</sup> If Congress intended to limit permissible activities of a defined venture to those particularized in NCRA § 2(a)(6), it would have been easy enough to accomplish. The Webb-Pomerene Act provides an exemplar in its use of the word "sole."<sup>329</sup> What Congress did, through its repeated use of "joint research and development venture" as a defined term of art in NCRA §§ 3, 4 and 5, was to bless *activities* serving identified *purposes* as eligible *prima facie* for the safe harbors. Thus, *activities* serving *purposes* within the particularizations of sub-parts (A) through and including (D) of NCRA § 2(a)(6) and the qualifications to the sub-parts of NCRA § 2(b) are eligible for the safe harbors whereas other *activities* are remitted to usual antitrust analyses and remedies. Any other construction would be insensible since, in effect, it would hamper organization of an incorporated or unincorporated joint venture vehicle as a cost and profit center (or being organized as a series of such centers geared to discrete R&D goals) in order to effect its own procurements, hiring, firing, and other entrepreneurial activities in a controlled fashion to serve the statutory purposes.

So, responding to the not too rhetorical questions posed some paragraphs ago, activities of not only a defined venture but also the venturers therein are subject to usual antitrust norms to the degree such activities are *clearly* beyond the purposes of NCRA § 2(a)(6) and the qualifications of NCRA § 2(b). Indulgences in such "ultra vires" activities, even should they be subject to characterization as anticompetitive or otherwise violative of antitrust laws or FTCA § 5(a)(1), do not deny NCRA safe harbors for activities either serving purposes listed by NCRA § 2(a)(6) or within the qualifications to NCRA § 2(b).

## VII. A Word to Planners

This being the case, planners would do well to perform as competent joint venture planners usually do, defining commercial objectives and proceeding from there. Through discrete analyses of (a) what can be done without prejudice to obtaining the benefit of the NCRA rule of reason and (b) what must be done to achieve the two safe harbors triggered by filing. After all, filing is *not* a price of the NCRA rule of reason.

It would seem that, assuming neutrality of all other factors such as securities regulation and tax implications, a venture vehicle possessed of the capacity of self-management always will be best to accommodate day-to-day R&D management *including licensing*. This

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328. 15 U.S.C. § 62 (1982).

329. See *supra* note 54.

would be particularly true if the R&D involved procurement and/or handling of volatiles. The same conclusion follows not only if there is sensitivity to one venturer or another deriving unfair advantage but also to the extent there is a perceived need to avoid the occasion of the rawer manifestations of conduct addressed by NCRA § 2(b). A distinct vehicle, preferably but not necessarily organized as a corporation, would be able to contract with suppliers and customers as well as to guard itself and its property from unauthorized invasion by venturers. It is quite conceivable that the master agreement between or among venturers would invoke the data exchange qualification to NCRA § 2(b) in order to guard against individual venturers' ability to abuse the relationship contemplated by NCRA § 2(a)(b). The real world provides a sufficient history of suppliers, customers and licensors' negotiating to achieve access to reciprocal's books for the proper purpose of keeping the other fellow honest. Why should data exchanges, designed to keep R&D joint venturers honest with one another and society at large, be any different?

Earlier, it was recommended that the vehicle be made a party to the base contract. This recommendation stands whether or not filing appropriate to the safe harbors is to be made. It is also recommended that counsel to R&D venturers and, ultimately, ventures, examine state unfair practice laws and the FTCA § 5(a)(1) "unfair . . . acts or practices" jurisdiction in context of the venturer's purposes and *implementation* thereof. This sensitivity should extend through licensing and test marketing. Failure, induced by what may be only a passing enfeeblement of the agency, to consider the power implicit in the FTC jurisdiction over "unfair" acts will not serve clients well if a later administration reinvigorates the Commission and staffs it with folk disdainful of NCRA.

### VIII. Conclusion

The starting point is the statute. In the case of NCRA, legislative history is more concealing than revealing. What has been blessed is international, not merely national, cooperative research. American entrepreneurs are not benefitted to a degree beyond non-Americans. The number of filings with DOJ will not tell us anything more than a minimum number of firms claiming full benefit of NCRA. The NCRA rule of reason well may come, in the fullness of time, to be invoked by non-filers. What benefits NCRA will endow upon America's trading accounts will depend entirely on the sagacity of American affiliates in multinational as well as domestic joint research and development ventures.



